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No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

COLUMBIA GAS TRANSMISSION CORPORATION,
Appellant

v.

HERSCHEL H. ROSE III,
TAX COMMISSIONER OF WEST VIRGINIA,
Appellee

ON APPEAL FROM THE SUPREME COURT OF
APPEALS OF WEST VIRGINIA

JURISDICTIONAL STATEMENT

H. L. SNYDER

F. SAMUEL BYRER
1700 MacCorkle Ave., S.E.
(P. O. Box 1273)
Charleston, WV 25325-1273
(304) 346-0951

Counsel for Appellant

June 3, 1982

JARRETT PRINTING COMPANY, CHARLESTON, W. VA.

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Questions Presented

(1) Whether the State's application of the gross receipts tax imposed by W. Va. Code §11-13-2c on "the business of selling at wholesale" is unreasonably malapportioned to the value of appellant's interstate wholesale selling activities in West Virginia, in violation of the Commerce Clause of U.S. Const. art. I, §8.

(2) Whether the State's application of the gross receipts tax imposed by W. Va. Code §11-13-2c on "the business of selling at wholesale" discriminates against

appellant's interstate wholesale sales of natural gas, in violation of the Commerce Clause of U.S. Const. art. I, §8.

Parties in the Court
Whose Judgment Is Sought To be Reviewed

The appellant taxpayers below are Columbia Gas Transmission Corporation (Columbia Transmission) and Columbia Gas of West Virginia, Inc. (Columbia-WV).[1] The proceedings were consolidated administratively to receive evidence, and the trial court subsequently endorsed the consolidation and, later, accepted the assurance of all counsel that Columbia-WV "could not prevail" on its appeal unless Columbia Transmission prevailed on the analogous issues it had raised.

The original defendant below was David C. Hardesty, Jr., Tax Commissioner of West Virginia. His successor named in the Jurisdictional Statement was substituted by a trial court order (A. at 8a), although the substitution was ignored by the Supreme Court of Appeals of West Virginia (A. at 4a, 5a & 6a).

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[1] Both Appellants below are subsidiaries of The Columbia Gas System, Inc., whose other subsidiaries are Columbia Gas System Service Corporation, Columbia LNG Corporation, Columbia Alaskan Gas Transmission Corporation, Columbia Coal Gasification Corporation, Columbia Hydrocarbon Corporation, The Inland Gas Company, Inc., Columbia Gas of Kentucky, Inc., Columbia Gas of Maryland, Inc., Columbia Gas of New York, Inc., Columbia Gas of Ohio, Inc., Columbia Gas of Pennsylvania, Inc., Columbia Gas of Virginia, Inc., Big Marsh Oil Company, Columbia Gulf Transmission Company, Columbia Gas Development Corporation, Columbia Gas Development of Canada Ltd., Commonwealth Gas Services, Inc., Commonwealth Gas Pipeline Corporation and Commonwealth Propane, Inc.

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Opinions Below

None of the opinions and orders cited below are reported.

The three orders of the Supreme Court of Appeals of West Virginia (Mar. 11, 1982, and Nov. 10 and Sept. 29, 1981) refusing Columbia Transmission's Petition for Appeal are printed in the Appendix at 4a, 5a, and 6a.

The judgment of the Circuit Court of Kanawha County, West Virginia (Apr. 24, 1981), rendering final judgment against Columbia Transmission, and the incorporated memorandum opinion (Mar. 2, 1981), are printed in the Appendix at 9a and 12a respectively.

The administrative decision of David C. Hardesty, Jr., then Tax Commissioner of West Virginia (June 29, 1979), is printed in the Appendix at 33a.

Grounds on Which Jurisdiction Is Invoked

Columbia Transmission, appellant, appeals from the final order of the Supreme Court of Appeals of West Virginia (A. at 4a), refusing an appeal from a judgment of the Circuit Court of Kanawha County, West Virginia (A. at 9a). The State courts upheld the assessment of gross receipts tax against Columbia Transmission by the Tax Commissioner of West Virginia on "the business of selling at wholesale" in the years 1970-74 in the amount of $1,107,803.29.[3] The tax was claimed under Section 2c of the West Virginia Business and Occupation Tax, codified as W. Va. Code §11-13-2c (A. at 74a). The sales were wholesale sales of natural gas in interstate commerce.

The final order of the Supreme Court of Appeals of West Virginia (A. at 4a), refusing Columbia Transmission's Petition of Appeal for the third time, was entered on March 11, 1982.

The notice of this present appeal (A. at 78a) was filed in the Supreme Court of Appeals of West Virginia on June 3, 1982. Since the Circuit Court of Kanawha County, West Virginia has possession of the record, a copy of the notice of appeal was also filed there.

This appeal is being docketed in this Court within 90 days from the final order below. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2).

Constitutional Provisions and Statutes

The Commerce Clause and the relevant West Virginia statutes are set forth in the Appendix beginning at 64a.

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[3] Because of various credits arising out of the balance of the audit, the amount of the judgment actually entered against Columbia Transmission was less than the assessment of tax upheld as to its interstate wholesale sales of gas.

Statement of the Case

This case has two Commerce Clause issues—tax malapportionment and tax discrimination against interstate commerce. The case was tried a few months after the Court handed down *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). It may be the first in which the evidence was designed by counsel for both taxpayer and State to meet the evidentiary requirements reiterated in that decision.

The raising of the constitutional questions

At the earliest stage of the proceedings below, which was a petition for administrative reassessment, Columbia Transmission raised the constitutional points based on the Commerce Clause. The administrative decision (A. at 33a) acknowledged the points but rejected them.

The appeal to the Circuit Court of Kanawha County, West Virginia involved the same constitutional issues, which the trial judge disposed of in his memorandum opinion (A. at 12a). This memorandum opinion was then incorporated into the judgment (A. at 9a).

The Supreme Court of Appeals of West Virginia denied Columbia Transmission's Petition for Appeal three times (A. at 4a, 5a & 6a) without opinion. The Chief Justice refused to issue a certificate indicating that the federal questions had been presented to that court. However, the affidavit of counsel (A. at 1a) establishes that the federal questions addressed in this Jurisdictional Statement were presented to that court as to the Tax Commissioner and the Circuit Court.

The interstate nature of the taxpayer's business

Columbia Transmission is a successor by merger of United Fuel Gas Company. Both companies primarily

engaged in the production, purchase, transmission, and wholesale sale of natural gas for resale in interstate commerce. United Fuel was the taxpayer of record for the first 18 months of the 1970-74 assessment period, and also engaged in the retail utility business in West Virginia.

The streams of interstate commerce in these wholesale sales vary widely. Columbia Transmission produces a part of its gas supply in West Virginia, and part elsewhere. The rest is produced by others in West Virginia and elsewhere, and Columbia Transmission takes delivery of some in West Virginia, and some elsewhere.

The dozen or so utilities who take wholesale deliveries of gas in West Virginia resell it both in West Virginia and elsewhere. For example, one resells all its wholesale purchases to West Virginia consumers; a second resells to consumers both in Virginia and West Virginia; and a third takes all its gas to Ohio.

In this case, the State of West Virginia is trying for the fourth time since 1952 to tax all the gross receipts from interstate wholesale sales of gas occurring in West Virginia. For half a century, the privilege tax infirmity barred the taxation of interstate wholesale sales of gas.[3] Since *Complete Auto*, the evidentiary standards are different.

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[3] The first time was immediately after the West Virginia Business and Occupation Tax was originally enacted. On the test case, this Court held that the tax could not reach any value past the wellhead, and limited the effect of the tax on producer sales to a severance tax. Hope Natural Gas Co. v. Hall, 274 U.S. 284 (1927). Subsequent versions of the statute have codified that the tax on production, now in W. Va. Code §11-13-2a (A. at 71a), is a severance tax.

The second time was in a 1950 audit. The then Tax Commissioner made about the same claim as is now before the Court. United Fuel refused to back down; and ultimately the Tax Commissioner reversed his position and conceded non-taxability on constitutional grounds.

(continued on page 9)

The evidence on malapportionment and discrimination

By reason of *Complete Auto's* demand for evidence on "economic realities" (430 U.S. at 279, 284), the economic consequence of the Business and Occupation Tax on these interstate wholesale sales was the subject of extensive evidence.

The evidence begins with the operational data, tracing the flow of gas from the Outer Continental Shelf in the Gulf of Mexico across the southwestern and southern States to Columbia Transmission's Appalachian market areas in West Virginia and elsewhere. The operational data involved four companies blanketing the natural gas business, from production wells through the interstate pipelines and the utility distribution systems to the end-use customers.

In addition, by agreement of counsel, the operational evidence was presented along conceptual lines. Five key exhibits showed concrete examples of repeated generalities—to clarify the difference between, e.g., imported gas passing through West Virginia and imported gas consumed in-State.

The record also contained the companies' full financial data on the common framework of their annual reports to the Federal Energy Regulatory Commission and the West Virginia Public Service Commission. Among other things, the financial evidence established the nature and

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(continued from page 8)

The third time was in the 1960s, when a new Tax Commissioner insisted on relitigating the old claims. The Supreme Court of Appeals of West Virginia upheld United Fuel's constitutional points on the wholesale sales with minor exceptions, which exceptions are back in contention now. United Fuel Gas Co. v. Battle, 153 W. Va. 222, 167 S.E.2d 890 (1969). (An appeal to this Court on other issues altogether was denied without opinion. See United Fuel Gas Co. v. Haden, 396 U.S. 116 (1969).)

The fourth time, of course, is now.

amount of all State taxes paid by Columbia Transmission and the other three companies involved in this exposition.

The operational and financial data underlay expert testimony by two economists specializing in public finance. The taxpayers introduced the testimony of Lowell Harriss of Columbia University in New York, and the State attempted to rebut with Peggy Musgrave of Northeastern University in Boston. The economists turned out to agree on almost every point concerning the Commerce Clause issues of apportionment and discrimination.

Unconstitutional malapportionment. Both economists testified that the West Virginia Business and Occupation Tax does not make economic sense. It is what economists call a "turnover tax", which Musgrave agreed is a "dreadful" tax from the economists' viewpoint—so harmful that Musgrave said she didn't know of a single economist who endorsed turnover taxes. The central flaw is implied in the generic name: the same values are taxed again and again through the commercial chain from production to consumption.[4] Thus, for example, the record documents that West Virginia seeks to tax the total gross receipts from four sales of the same imported gas—consecutive wholesale sales by Tenneco Inc., Columbia Transmission and Columbia-WV, and retail sale by Union Oil & Gas Inc. It also shows the attempted taxation of the total gross receipts from consecutive wholesale sales of the same imported gas destined for export to other States.

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[4] Turnover taxes are also arbitrary and discriminatory in their effect on different products, and on different sales of the same product—a flaw which is exacerbated when, as in West Virginia, the tax has varying rates. They create an artificial inducement to the consolidation of businesses, thus tending to wipe out small firms by their incorporation into larger companies. They tend somewhat to encourage sellers to export their goods for sale, thereby discouraging local commerce and encouraging commerce between different States or different countries. Such tax incentives are unhealthy, because tax considerations are then distorting economic decisions without contributing value.

W. Va. Code §11-13-2c (A. at 74) has no apportionment formula as such. It merely taxes the total gross receipts of all sales made in West Virginia. The State argued and the Circuit Court held this sufficed as a method of apportionment.

The economists' evidence on apportionment included a comparison of turnover taxes with corporation net income taxes. They agreed the point of sale made no economic sense to decide fair apportionment of net income taxes on interstate commerce. Harriss showed why he had the same view of turnover taxes on interstate commerce—because proper apportionment between two or more States would base the division on the increments of capital investment and labor performed in each.

Musgrave felt apportionment was a "political" term, but she was on record that turnover taxes were "basically different in nature" from sales taxes. On cross-examination about this difference, she explained that turnover taxes are applied in a "cumulative multiple fashion" over and over on the same value. Moreover, she explained that turnover taxes, unlike sales taxes, have "elements in economics of what we call both the destination principle embodied in a retail type sales tax and the origin principle embodied in sales taxes applied at stages prior to the retail state."

So Musgrave effectively agreed with Harriss: point-of-sale taxation of the total gross receipts from interstate wholesale sales wrongly taxes the value increments imported from other States.

Unconstitutional discrimination. The two economists agreed that the Business and Occupation Tax discriminates against Columbia Transmission's interstate whole-

sale sales in West Virginia in two ways. Musgrave, the State's witness, pointed out a third.

The first discrimination concerns the interplay between the severance tax of W. Va. Code §11-13-2a (A. at 71a) and the wholesale tax of §11-13-2c (A. at 74a). W. Va. Code §11-13-2 (A. at 68a) provides, inter alia, that if a gas producer pays the severance tax on his own wells in West Virginia, he is not required to pay wholesale taxes on his subsequent sales of the same gas. However, on production in any other State, imported into West Virginia for wholesale sale here, the State claims wholesale taxation. Harriss and Musgrave agreed that this tax scheme is a disincentive to produce gas elsewhere for wholesale sale in West Virginia, and a correlative incentive to produce the gas locally, and thus discriminates against interstate commerce. Columbia Transmission and its suppliers produced gas in many States with severance taxes, for resale in West Virginia, so that the discrimination is proved in fact.

The second discrimination against interstate commerce is also limited to the first part of the assessment period. At that time, W. Va. Code §11-13-2d (A. at 75a) allowed a deduction against a gas utility's retail gross receipts of West Virginia severance taxes it had paid on its own gas production. The statutory deduction was not allowed on account of severance taxes paid any other State, either by the utility itself or any of its wholesale suppliers. Harriss and Musgrave both said this provision discriminated economically against any utility producing or purchasing gas elsewhere and bringing it inside West Virginia for sale to the public. United Fuel was the victim of this discrimination: for the first nine months of 1970, it was a local utility as well as an interstate pipeline company; and 90% of its gas supply came from the Southwest.

The third discrimination against interstate wholesale sales was developed during Musgrave's cross-examination. It involves the special treatment of manufacturers by W. Va. Code §11-13-2b (A. at 73a). This section of the Business and Occupation Tax does more than provide a tax rate. It also provides a statutory apportionment for goods manufactured in interstate commerce: instead of taxing the total gross receipts from sales of interstate manufactured goods, it taxes only the portion determined by the West Virginia portion of labor costs or total costs at the manufacturer's option.

Musgrave acknowledged that this value-added type of apportionment of manufactured products was inconsistent with the point-of-sale approach of the other classifications under the Business and Occupation Tax. She could not think of "any rational reason" so to apportion the gross receipts from manufacturer's sales, and at the same time to deny comparable apportionment to other interstate commerce. The economic result is that the Business and Occupation Tax discriminates in favor of interstate manufacturers and against interstate gas companies.

The Questions Are Substantial

A. From the beginning, this case was developed to meet the Court's recent insistence on evidence of "economic realities" to test State tax apportionment issues.

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 287 (1977) restated four ways in which a taxpayer might attach a State tax on Commerce Clause grounds:

> ". . . [1] that the activity is not sufficiently connected to the State to justify a tax, or [2] that the tax is not fairly related to benefits provided

> the taxpayer, or [3] that the tax discriminates against interstate commerce, or [4] that the tax is not fairly apportioned."

The Court emphasized in addition that constitutional tax problems should be decided on "economic realities" (*id.* at 279, 284) rather than "magic words" or "formalism" (*id.* at 284, 288).

From 1964 to date, no taxpayer seems to have satisfied the Court's requirement. *Compare General Motors Corp. v. Washington*, 377 U.S. 436 (1964) *with Standard Pressed Steel Co. v. Washington*, 419 U.S. 560 (1975) *and Moorman Manufacturing Co. v. Bair*, 437 U.S. 267 (1977). If West Virginia is any guide, the State courts have been equally insistent on hard evidence rather than "naked allegations". *E.g., J. C. Penney Co. v. Hardesty*, 264 S.E.2d 604, 612 (W. Va. 1979), and *Western Maryland Ry. v. Goodwin*, 282 S.E.2d 240, 254-55 (W. Va. 1981).

The effect of the decision below is that all of Columbia Transmission's evidence was beside the point. The Circuit Court held the evidence did *not* prove what the economists testified it *did* prove. The Circuit Court also held that the physical location of the wholesale sales was the only fact that mattered to apportionment (A. at 21a & 22a). The Supreme Court of Appeals, without comment, refused to disturb the holding (A. at 4a, 5a & 6a).

This Jurisdictional Statement summarizes, and a full-dress presentation would amplify, the congruency of many of this Court's decisions before and after *Complete Auto* with the "economic realities" of apportionment as shown by the evidence. And the apportionment question is all the more substantial because the taxing power of the States has been expanding to a level disturbing to economists. Musgrave testified, "[T]here is some cause for

concern, because . . . the common market concept can get interfered with . . . . And . . . as state and local governments look for . . . new sources of tax revenue . . . inevitably this will have an impact on the pattern of interstate trade . . . ."

If the term "apportionment" is to have economic meaning, apportionment between taxing jurisdictions can only be related to the value-increments inhering or accruing by reason of economic activity in each. The economists' testimony in this case, recorded in 1977, squares with the Court's most recent observation: "To be valid, a tax on interstate commerce must be reasonably apportioned to the value of the activities occurring within the State upon which the Tax is imposed." *Maryland v. Louisiana*, 451 U.S. 725, 755, n. 27 (1981).

The testimony of the two economists shows why West Virginia taxation of the total gross receipts from interstate wholesale sales is indefensible from the standpoint of the "economic realities": the activity taxed by W. Va. Code §11-13-2c, "selling any tangible property" (A. at 74a), contributes very little to the value of the property being sold.

In other words, point-of-sale apportionment of gross receipts taxes on interstate wholesale sales of property is as economically illogical as it would be with a bloc sale of interstate bus tickets. The basic value inhering in a sale of property is the property, just as the basic value inhering in the sale of bus tickets is the journey. The selling activity in both cases is a small part of the value.

B. The Court has consistently rejected gross receipts taxation of interstate wholesale sales, and the economic evidence justifies the judicial precedent.

The economic realities justify, if they do not explain, why this Court has never approved point-of-sale apportionment of gross receipts taxation of interstate wholesale sales. The cases are summarized in note 5 for the State of origin, consumption, and mere transit.[5]

The case at bar presents the whole range of factual variants. Columbia Transmission's interstate wholesale sales before the Court involve West Virginia as the State of origin, of consumption, and of mere transit; and West Virginia is attempting to extend its taxing power beyond any decision of the Court.

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[5] *State-of-origin-taxation.* On at least three occasions, the Court has held that the State of origin can not apply a gross receipts turnover tax to the total receipts from wholesale sales in interstate or foreign commerce. EVCO v. Jones, 409 U.S. 91 (1972) (interstate wholesale sales of photographic supplies); Gwin, White & Prince, Inc. v. Henneford, 305 U. S. 434 (1939) (interstate wholesale brokerage of fruit); Crew Levick Co. v. Pennsylvania, 245 U.S 292 (1917) (foreign commerce in unspecified goods). Note that none of these cases involved a privilege tax: they dealt only with *Complete Auto's* "economic realities". By contrast, *Complete Auto* involved a one-State transporter, whose haulage charges could not possibly compare to the full wholesale price of the imported goods.

State-of-consumption taxation. The Court has also rejected gross receipts taxation by the State of consumption of an interstate wholesale sale of imported gas. State Tax Commission v. Interstate Natural Gas Co., 284 U.S. 41 (1931). Justice Holmes's opinion was partially grounded on the privilege tax shibboleth ruled out by *Complete Auto;* but an independent basis of its holding was the wholesale nature of the gas company's business. *Infra* p. 18. General Motors Corp. v. Washington, 377 U.S. 436 (1964) upheld a gross receipts tax on interstate wholesale sales by the State of consumption, but noted that the claim of faulty apportionment was not based on evidence in the record. *Id.* at 448-49. In the case at bar, the apportionment evidence is in the record.

State-of-transit taxation. As far as counsel for Columbia Transmission can discover, the Court has never ruled on gross receipts taxation of interstate wholesale sales by an intermediate State, neither of origin nor consumption. Surely, however, a State has a weaker claim to tax goods merely in transit than the State of either origin or consumption.

The economic evidence shows that point-of-sale apportionment will not do for wholesale sales. If taxes on wholesales and other mid-stream activities in interstate commerce are to be "reasonably apportioned" among the States, economic rationality requires that the apportionment should be based on the activities which create value or wealth, that is, human effort and the use of property.

The West Virginia tax here, and the Mississippi tax in *Complete Auto*, are both "privilege taxes", subject to a special constitutional shibboleth before *Complete Auto* rejected it. More important, however, both the West Virginia tax and Mississippi tax are gross receipts taxes. But the Mississippi gross receipts arose from in-State transportation charges by a one-State carrier, whereas the gross receipts at bar arose from wholesale sales of the property itself (natural gas) rather than in-State haulage.

The economists' evidence proves that turnover taxes on wholesale sales are fundamentally different from retail sales taxes. Most critically, turnover taxes "cascade" their effect by repeated levies on the same values: witness the repeated Business and Occupation Tax levies (*supra* p. 10) on the gas in this case.[6] Harris testified that cascading does not happen with retail sales taxes, which is why a different approach to apportionment of

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[6] Harriss described the tax history of post-war Europe, where turnover taxes were the primary source of government revenue from business. He related how the professional economists convinced the political leadership of the Common Market that the inherent disadvantages of turnover taxes far outweighed their ease of administration and revenue-producing power. The Common Market countries did away with their turnover taxes, and switched primarily to value-added taxes, which enable each participant in the stream of commerce to report for taxation in his country only the increment of value added by his own investment and work. The change was so economically beneficial that one country after another outside the Common Market followed suit. Today, turnover taxes are unknown among the major countries of western Europe.

wholesale sales taxation is required to make economic sense. Musgrave described turnover taxes as "basically different in nature" from ordinary sales taxes, because turnover taxes impose "cumulative multiple" taxation, i.e., cascading.

This Court has long made a broader distinction: the States have more power over retail sales than over wholesale sales. The rationale goes back at least as fas as *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851), which established the balancing of national against local interests as a fundamental Commerce Clause test of State power. By this constitutional test and in economic fact, the local interest in retail sales to the individual consumer is far greater than in the movement of goods from the producer to the retailer.

In the tax field, the wholesale/retail distinction settled the law with two natural gas cases in the same year: Ohio's gross receipts tax on retail sales of imported gas was upheld in *East Ohio Gas Co. v. Tax Commission*, 283 U.S. 465 (1931), whereas Mississippi's gross receipts tax on wholesale sales of imported gas was overthrown in *State Tax Commission v. Interstate Natural Gas Co.*, 284 U.S. 41 (1931). The latter of these tax cases expressly rested (*id.* at 43) on contrasting police power decisions involving the same gas company, comparing *Missouri ex rel. Barrett v. Kansas Natural Gas Co.*, 265 U.S. 298 (1924) (States may not regulate the rates of interstate wholesale sales of natural gas) with *Public Utilities Commission v. Landon*, 249 U.S. 236 (1919) (States may regulate interstate retail rates of the same company).

The Court, then, has said that wholesale sales are constitutionally unlike retail sales for all Commerce Clause tests of State power, whether to tax or to police. *Accord:*

Public Utilities Commission v. Attleboro Steam & Electric Co., 273 U.S. 83 (1927) (States can not regulate interstate wholesale sales of electric power); *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940) (State consumer sales tax may reach interstate sales); *Standard Pressed Steel Co. v. Washington*, 419 U.S. 560 (1975) (State gross receipts tax may reach interstate sales to a "local consumer", i.e., a retail sale).

In short, the Commerce Clause decisions agree with the fundamental economic points that Harriss and Musgrave made. In law as well as economics, wholesale sales are different from retail sales.[7]

By meeting the evidentiary burden, Columbia Transmission satisfied the malapportionment test restated in *Maryland v. Louisiana*, 451 U.S. 725 (1981): it proved that the tax on interstate wholesale sales under W. Va. Code §11-13-2c is not "reasonably apportioned to the value of the [wholesale selling] activities occurring within the State upon which the Tax is imposed." *Id.* at 755, n. 27.

C. The apportionment decision below is in conflict with a sister State's 1981 decision on a similar gross receipts tax.

Washington is one of the four states besides West Virginia with a full-blown gross receipts tax, and a case in that jurisdiction was recently decided on evidence analogous to the evidence in the case at bar. The State court results, however, are in conflict.

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[7] This is not at all to say that interstate commerce does or should have a free ride on the backs of State taxpayers. It should not, and the record proves it does not in this case. In 1974, for example, Columbia Transmission paid $7.9 million in West Virginia taxes (including almost $900,000 in Business and Occupation Tax)—39% of the company's aggregate $20.2 million in State and local taxes for its operating area in Kentucky, Maryland, New York, Ohio, Pennsylvania, Virginia, and West Virginia.

Department of Revenue v. J. C. Penney Co., 96 Wash. 2d 38, 633 P.2d 870 (1981) concerned interstate credit services by a merchandiser to its retail customers. The business category under Washington's gross receipts tax was the catch-all service category. The Department of Revenue assessed the total gross receipts from the interstate credit services to Washington consumers; Penney's introduced apportionment evidence showing which credit values occurred in Washington and which elsewhere; and the trial court upheld the assessment. On Penney's appeal, the Supreme Court of Washington reversed the judgment below, and remanded the case for apportionment of the gross receipts tax on "the intrastate values of the enterprise" (633 P.2d at 876).

The resultant conflict between Washington and West Virginia is not a conflict between federal courts of appeal. In light of the Tax Injunction Act, 28 U.S.C. §1341, it could not be. But it does mean that a federal constitutional question has been decided one way in Washington and another in West Virginia—a classic indicium of a question of substance.

D. The discrimination against interstate commerce is palpable.

As noted *supra* pp. 12-13, the economists' testimony showed three ways in which the West Virginia Business and Occupation Tax discriminates against the interstate wholesale sales at issue. First was the forgiveness of wholesale taxation of West Virginia producers paying the severance tax; second was the 1970-71 deduction of West Virginia severance tax paid by a local utility from its retail gross receipts; and third was the deduction of out-of-State costs allowed a manufacturer but not a wholesaler like Columbia Transmission.

The evidence on severance taxes paid other States on much of Columbia Transmission's gas supply, without more, satisfied any reasonable requirement of proof. Yet the Circuit Court held that the proof of the first and second discriminations was inadequate because Columbia Transmission did not prove the "actual monetary discrimination" "in dollars and cents" (A. at 30a & 31a).

The error has been exposed by *Maryland v. Louisiana*, 451 U.S. 725 (1981). This Court rendered judgment on the pleadings against the Louisiana First Use Tax for discriminating against interstate commerce. The Court held that the tax was discriminatory on its face—that "No further hearings are necessary to sustain this conclusion"—and that "hearings . . . to provide a precise determination of the extent of the discrimination" were not necessary. *Id.* at 756, 759-60.

Thus the precision of proof required by the Circuit Court is not necessary. The economists verified that in economic reality, the tax discriminated (i) in favor of West Virginia production and against imported parts of Columbia Transmission's gas supply, and (ii) in 1970-71, in favor of retail utilities' local production and against United Fuel's interstate gas supply. Consequently, the judgment below erroneously ignores the first and second discriminations.

The Circuit Court also held (A. at 31a-32a) that Columbia Transmission could not be heard on the third discrimination (the advantage given manufacturers) because wholesale selling is a different activity than manufacturing. But this holding is refuted by the tax statute itself: manufacturing is measured by "gross proceeds derived from the sale", and wholesaling by "gross income", and the statutory definitions show that the mea-

sures are identical in effect. W. Va. Code §§ 11-13-1, -2b, -2c (A. at 65a, 73a & 74a). Yet one seller can subtract his out-of-State costs and the other can not.

The result is that the Business and Occupation Tax discriminates between two different lines of interstate commerce. Consequently the judgment below is erroneous on the third discrimination on another holding in *Maryland v. Louisiana*, 451 U.S. 725 (1981): the central discrimination was the taxing of gas moving across Louisiana when compared to not taxing gas imported for consumption. This result reinforced *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977), the first time the Court held that discrimination between two kinds of interstate commerce in the same tax is as unconstitutional as discrimination between interstate and intrastate commerce.

Conclusion

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

H. L. SNYDER

F. SAMUEL BYRER
1700 MacCorkle Avenue, S.E.
(P. O. Box 1273)
Charleston, WV 25325-1273
(304) 346-0951

Counsel for Appellant

June 3, 1982

CERTIFICATE OF SERVICE

This is to certify that service of three copies of the foregoing Jurisdictional Statement to the Supreme Court of the United States was made on the only party required to be served by mailing to Appellee's attorney, Robert P. Howell, Assistant Attorney General, addressed to him at the Attorney General's Office, State Capitol, Charleston, West Virginia 25305, in the regular United States mail, postage prepaid, this 3rd day of June, 1982.

/s/ H. L. SNYDER

H. L. Snyder
1700 MacCorkle Avenue, S.E.
(P. O. Box 1273)
Charleston, WV 25325-1273

Attorney for Columbia Gas
Transmission Corporation

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

COLUMBIA GAS TRANSMISSION CORPORATION,
Appellant,

v.

HERSCHEL H. ROSE III,
Tax Commissioner of West Virginia,
Appellee.

APPENDIX
TO
JURISDICTIONAL STATEMENT

JARRETT PRINTING COMPANY, CHARLESTON, W. VA.

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STATE OF WEST VIRGINIA)
COUNTY OF KANAWHA) TO-WIT:
CITY OF CHARLESTON)

AFFIDAVIT

Now comes H. L. Snyder and, after being duly sworn according to law, deposes and says that:

Affiant is licensed to practice as an attorney at law in the State of West Virginia. He is a member of the bar of the Supreme Court of the United States. Affiant has been counsel for Columbia Gas Transmission Corporation (Columbia Transmission) at all stages of certain tax assessment proceedings against the company arising under the West Virginia Business and Occupation Tax (W. Va. Code c. 11, art. 13) for the tax period 1970-1974. These proceedings were administratively styled *Columbia Gas Transmission Corp.*, Docket No. 77-112-B et al. The assessment was resisted on the advice of counsel that, among other things, the assessment of such taxes would violate Columbia Transmission's rights under the Commerce Clause of U. S. Const. art. I, § 8.

The administrative decision was adverse to Columbia Transmission et al., and an appeal was timely taken pursuant to statute under the style of *Columbia Gas Transmission Corp.* v. *Hardesty*, Civil No. AP-CA-79-89 et al. (Kanawha (W. Va.) Cir. Ct., filed July 27, 1979). This appeal was rejected in toto by an order of the Circuit Court entered April 24, 1981, imposing an adverse judgment against Columbia Transmission in the amount of $1,091,695.92 plus interest, and against the other defendant in the amount of $3,495.61 plus interest. After the entry of the judgment order, by another order entered June 12, 1981, the Circuit Court substituted as the defendant Herschel H. Rose III, Tax Commissioner

of West Virginia, in the place and stead of the original defendant Tax Commissioner.

On June 23, 1981, Columbia Transmission et al. timely filed a Petition for Appeal from the judgment of the Circuit Court before the Supreme Court of Appeals of West Virginia, which is the highest court in the State. The Supreme Court of Appeals of West Virginia decided not to hear the appeal, and thus refused the Petition for Appeal on three separate applications by Columbia Transmission et al., by orders entered September 29 and November 10, 1981, and March 11, 1982. These orders failed to reflect the substitution of the present defendant.

Columbia Transmission decided to appeal the adverse judgment to the Supreme Court of the United States. In connection with this appeal, to clarify on the record the fact that Columbia Transmission had asserted its rights arising under the Commerce Clause of U. S. Const. art. I, § 8 from the beginning, affiant appeared before Chief Justice Thomas B. Miller of the Supreme Court of Appeals of West Virginia on April 26, 1982, and requested him to execute and enter a certificate that in the prosecution of its timely appeal to the Supreme Court of Appeals of West Virginia, Columbia Transmission had raised and presented to the court the following federal questions, which are taken verbatim from said Petition for Appeal:

> "*Assignment of Error No. 3*
>
> "The Circuit Court erred in failing to hold that the Tax Commissioner's application of B&O Section 2c (Code § 11-13-2c) is not reasonably apportioned to the value of Transmission Corporation's interstate wholesale selling activities occurring within the State, and thus violates the Commerce Clause of U. S. Const. art. I, § 8.

"Instead, the Circuit Court incorrectly held that apportionment solely by the point of sale was constitutionally permissible.

"*Assignment of Error No. 4*

"The Circuit Court erred in failing to hold that the Tax Commissioner's application of B&O Section 2c (Code § 11-13-2c) discriminates against Transmission Corporation's interstate wholesale sales in several ways, and thus additionally violates the Commerce Clause.

"Instead, the Circuit Court incorrectly held that the several discriminatory effects either were not proved (which they were), or were permissible because different types of business were involved (which is beside the point on the facts at bar)."

A copy of the requested certificate was delivered to Robert P. Howell, Assistant Attorney General of West Virginia, counsel for the defendant. On information, counsel for the defendant signified to the Clerk of the Supreme Court of Appeals of West Virginia that the defendant had no objection to the Chief Justice executing and entering the requested certificate. However, the Chief Justice of the Supreme Court of Appeals of West Virginia nevertheless declined to execute the certificate on the ground that it was not necessary for him, or for the Court as a whole, to document the fact that Columbia Transmission's Petition for Appeal had raised and presented the federal questions as above quoted.

/s/ H. L. SNYDER

H. L. SNYDER

Subscribed and sworn to this 2nd day of June, 1982.

My Commission expires March 21, 1988.

/s/ SANDRA K. NEYLON

Notary Public, Kanawha
County, West Virginia

[NOTARIAL SEAL]

ORDER OF
WEST VIRGINIA SUPREME COURT OF APPEALS
(March 11, 1982)

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 11th day of March, 1982, the following order was made and entered, to-wit:

Columbia Gas Transmission Corp., a corp.
vs. AP-CA-79-89
David C. Hardesty, Jr., Tax Commr., etc.

Columbia Gas of West Virginia, Inc., a corp.
vs. AP-CA-79-90
David C. Hardesty, Jr., Tax Commr., etc.

On a former day, to-wit, November 30, 1981, came again the petitioners, Columbia Gas Transmission Corporation, a corporation and Columbia Gas of West Virginia, Inc., a corporation, by H. L. Snyder and F. Samuel Byrer, and Dean Gerwig, their attorneys, and presented to the Court their petition and supplemental argument in support thereof, praying for an appeal from a judgment of the Circuit Court of Kanawha County rendered in these actions on the 24th day of April, 1981, with the

record therein accompanying the petition, which being seen and inspected the appeal prayed for is refused by a majority of the Court of this third application. Justice Neely would grant. Justice McHugh absent.

A True Copy

/s/ GEORGE W. SINGLETON

Attest: _____

Clerk Supreme Court of Appeals

ORDER OF WEST VIRGINIA SUPREME COURT OF APPEALS

(November 10, 1981)

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 10th day of November, 1981, the following order was made and entered, to-wit:

Columbia Gas Transmission Corp., a corp.
vs. AP-CA-79-89
David C. Hardesty, Jr., Tax Commr., etc.

Columbia Gas of West Virginia, Inc., a corp.
vs. AP-CA-79-90
David C. Hardesty, Jr., Tax Commr., etc.

This day, November 10, 1981, came again the petitioners, Columbia Gas Transmission Corporation, a corporation, and Columbia Gas of West Virginia, Inc., a corporation, by H. L. Snyder and F. Samuel Byrer and Dean Gerwig, their attorneys, and presented to the Court their petition praying for an appeal from a judgment of

the Circuit Court of Kanawha County rendered in these actions on the 24th day of April, 1981, with the record therein accompanying the petition, which being seen and inspected the appeal prayed for is refused by a majority of the Court on this second application. Justice Neely would grant. Justice McHugh deeming himself disqualified, did not participate in the consideration of these actions. Chief Justice Harshbarger absent.

A True Copy

/s/ GEORGE W. SINGLETON

Attest: _____

Clerk Supreme Court of Appeals

ORDER OF WEST VIRGINIA SUPREME COURT OF APPEALS

(September 29, 1981)

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 29th day of September, 1981, the following order was made and entered, to-wit:

Columbia Gas Transmission Corp., a corp.
vs. AP-CA-79-89
David C. Hardesty, Jr., Tax Commr., etc.

Columbia Gas of West Virginia, Inc., a corp.
vs. AP-CA-79-90
David C. Hardesty, Jr., Tax Commr., etc.

On a former day, to-wit, August 18, 1981 came the petitioners, Columbia Gas Transmission Corporation, a

corporation and Columbia Gas of West Virginia, Inc., a corporation, by H. L. Snyder and F. Samuel Byrer, and Dean Gerwig, their attorneys, and presented to the Court their petition praying for an appeal from a judgment of the Circuit Court of Kanawha County rendered in these actions on the 24th day of April, 1981, with the record therein accompanying the petition, which being seen and inspected by the Court the appeal prayed for is refused. Justice McHugh deeming himself disqualified, did not participate in the consideration of these actions. Chief Justice Harshbarger absent.

A True Copy

/s/ GEORGE W. SINGLETON

Attest: _____.

Clerk Supreme Court of Appeals

ORDER OF CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

(June 12, 1981)

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

COLUMBIA GAS TRANSMISSION CORPORATION, a corporation,
Plaintiff,

v. CIVIL ACTION NO. AP-CA-79-89
(Judge Goshorn)

DAVID C. HARDESTY, JR.,
Tax Commissioner of
West Virginia,
Defendant.

COLUMBIA GAS OF WEST VIRGINIA,
INC., a corporation,
Plaintiff,

v. CIVIL ACTION NO. AP-CA-79-90
(Judge Goshorn)

DAVID C. HARDESTY, JR.,
Tax Commissioner of
West Virginia,
Defendant.

ORDER

This day came the parties hereto, Columbia Gas Transmission Corporation, by counsel, F. Samuel Byrer, Columbia Gas of West Virginia, Inc., by counsel, Dean Gerwig, and Herschel H. Rose III, presently Tax Commissioner of the State of West Virginia, by Robert P. Howell, Assistant Attorney General, and jointly represented to the Court that David C. Hardesty, Jr., former Tax Commissioner of the State of West Virginia, the defendant in his official capacity to these actions, has resigned the aforementioned office; that John D. Rockefeller IV, Governor of West Virginia, thereafter nominated and, by and with the counsel of the Senate of West Virginia, appointed said Herschel H. Rose III to be Tax Commissioner of the State of West Virginia; and that Herschel H. Rose III is now serving as such.

Whereupon, upon joint motion of counsel, and upon mature consideration of the matter, the Court ORDERS that Herschel H. Rose III, Tax Commissioner of the State of West Virginia, be substituted as the defendant in these actions in the place of David C. Hardesty, Jr., former Tax Commissioner of the State of West Virginia.

ENTER this 12 day of June, 1981.

/s/ ODEN F. GOSHORN
JUDGE

/s/ROBERT P. HOWELL
Assistant Attorney General
Counsel for Defendant
/s/F. SAMUEL BYRER
Counsel for Columbia Gas
Transmission Corporation,
a corporation
/s/DEAN GERWIG
Counsel for Columbia Gas
of West Virginia, Inc.
a corporation

ORDER AND INCORPORATED MEMORANDUM OPINION OF CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

(April 24, 1981)

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

COLUMBIA GAS TRANSMISSION CORPORATION, a corporation,
Plaintiff,

v. CIVIL ACTION NO. AP-CA-79-89
(Judge Goshorn)

DAVID C. HARDESTY, JR.,
Tax Commissioner of
West Virginia,
Defendant.

COLUMBIA GAS OF WEST VIRGINIA,
INC., a corporation,
Plaintiff,

v. CIVIL ACTION NO. AP-CA-79-90
(Judge Goshorn)

DAVID C. HARDESTY, JR.,
Tax Commissioner of
West Virginia,
Defendant.

ORDER

These causes came on to be heard upon appeals properly filed under the former procedure of W. Va. Code § 11-13-8, effective for these appeals under W. Va. Code § 11-10-20. The notices of appeal were filed by plaintiffs, Columbia Gas Transmission Corporation, a corporation, (hereinafter "Transmission Corporation"), and Columbia Gas of West Virginia, Inc., a corporation, (hereinafter "Columbia-West Virginia") from decisions of defendant, the Tax Commissioner of West Virginia, holding plaintiffs liable to the State of West Virginia for business and occupation tax. Upon consideration of the notices, the answers of defendant, the record made at an administrative hearing held on June 14-15 and October 5, 1977, the reassessment decisions of defendant, the Order entered herein consolidating these causes, the Order entered herein relieving Columbia-West Virginia from the obligation of filing a brief, all of which are made a part of the record herein, and upon consideration of the briefs filed by counsel for Transmission Corporation and defendant, the Court rendered a letter memorandum of opinion dated March 2, 1981, a copy of which is attached hereto, filed herein, and made a part of the record herein, holding

that the assessments of business and occupation tax, against the plaintiffs, as modified by administrative decisions made by defendant, were proper and should be affirmed.

It is, therefore, ORDERED and ADJUDGED that the decision of defendant, dated the 29th day of June, 1979, assessing a business and occupation tax indebtedness in the amount of $1,091,247.75, with penalties thereon in the amount of $448.17, for a total liability of $1,091,695.92, against Transmission Corporation is hereby affirmed. It is therefore ORDERED that the defendant have judgment for and do recover of and from Transmission Corporation the sum of $1,091,695.92.

It is further ORDERED and ADJUDGED that the decision of the defendant, dated the 29th day of June, 1979, assessing a business and occupation tax indebtedness in the amount of $3,495.61, against Columbia-West Virginia, is hereby affirmed. It is therefore ORDERED that the defendant have judgment for and do recover of and from Columbia-West Virginia the sum of $3,495.61.

And plaintiffs herein, having timely moved the Court for rehearing of these matters, and the Court being fully advised and having carefully considered said motions, is of the opinion to and doth hereby OVERRULE said motions for rehearing.

To all of which plaintiffs, by counsel, do hereby object and except.

ENTER this 24 day of April, 1981.

/s/ ODEN F. GOSHORN
JUDGE

Presented by:

/s/ ROBERT P. HOWELL
Assistant Attorney General
Counsel for Defendant

Approved as to form by:

/s/ F. SAMUEL BYRER
Counsel for Columbia Gas
Transmission Corporation,
a corporation

/s/ E. DEAN GERWIG
Counsel for Columbia Gas
of West Virginia, Inc.
a corporation

STATE OF WEST VIRGINIA
THIRTEENTH JUDICIAL CIRCUIT
KANAWHA COUNTY COURTHOUSE
CHARLESTON, WEST VIRGINIA 25301

ODEN F. GOSHORN
JUDGE

March 2, 1981

H. L. SNYDER, ESQUIRE
F. SAMUEL BYRER, ESQUIRE
Law Department
Columbia Gas Transmission Corporation
Post Office Box 1273
Charleston, West Virginia 25325

DEAN GERWIG, ESQUIRE
Columbia Gas of West Virginia, Inc.
99 North Front Street
Columbus, Ohio 43215

ROBERT P. HOWELL, ESQUIRE
Assistant Attorney General
Tax Division
State Capitol Building No. 1
Room No. W-435
Charleston, West Virginia 25305

Re: Columbia Gas Transmission Corporation, a Delaware corporation, v. David C. Hardesty, Jr. as Tax Commissioner of the State of West Virginia Civil Action No. AP-CA-79-89
Columbia Gas of West Virginia, Inc., a West Virginia corporation, v. David C. Hardesty, Jr., as Tax Commissioner of the State of West Virginia Civil Action No. AP-CA-79-90

Gentlemen:

These two appeals involving the West Virginia business and occupation tax are before this Court pursuant to the provisions of West Virginia Code, 11-13-8 [1963] and Code, 11-10-20(b) [1978]. The record in these two appeals consists of the respective notices of appeal; the respective answers with attached exhibits in the form of a certified copy of each original assessment and final administrative decision; the transcript of the administrative hearings, including exhibits filed therewith; and all other matters of record. The parties have also submitted memoranda of authorities.

There is no dispute on the record with respect to the findings of fact made by the tax commissioner in his administrative decisions in these cases. The Court must

review only the evidence in the record made before the tax commissioner at the administrative hearings. *Virginia Electric & Power Co.* v. *Haden*, 157 W. Va. 298, 305, 200 S.E.2d 848, 853 (1973). The Court concludes that there is substantial evidence on the whole record to support the tax commissioner's findings of fact in his administrative decisions herein.

Three issues of law are presented for judicial review in the Transmission Corporation case. These may be stated as follows:

(1) For the tax periods from July 1, 1971 through December 31, 1974, whether the reassessment per the administrative decision should be vacated as "moot" inasmuch as affirmation of the reassessment would result in a potentially completely offsetting business and occupation tax credit against the corporation net income tax liability of the taxpayer for these tax periods pursuant to West Virginia Code, 11-24-9(a) [1969] and a refund of corporation net income tax previously paid for these tax periods,

(2) Whether the business and occupation tax penalty provided by West Virginia Code, 11-13-11 [1955] should be waived by the tax commissioner for "reasonable cause" as a matter of law, where the penalty attaches automatically by the statute to certain concededly taxable activities not reported through oversight or the like but where, without the penalty, the business and occupation tax credit provided by West Virginia Code, 11-24-9(a) [1969] will potentially completely offset the corporation net income tax liability of a taxpayer who has previously paid corporation net income tax for the tax period (a) [sic] in question and who, therefore, may be entitled to a refund of the corporation net income tax previously paid;

(3) Whether the wholesale sales classification of the West Virginia business and occupation tax (West Virginia Code, 11-13-2, first paragraph, and -2c, as amended) is applicable to wholesale sales of natural gas to West Virginia customers of a natural gas transmitter who produces or acquires the natural gas without West Virginia (and transmits it or other persons transmit it to this state through other states) or who transmits natural gas produced herein by others from this state and re-transmits it back into this state for wholesale sales to West Virginia customers.

The tax commissioner determined in his administrative decision that (1) the business and occupation tax question as to taxability of wholesale sales was not moot; (2) the business and occupation tax penalty was not required to be waived as a matter of law; and (3) the wholesale sales were taxable even though the statute fails to provide for apportionment or allocation of out-of-state values. For the reasons hereinafter set forth the Court affirms each of these determinations.

With respect to Columbia Gas of West Virginia, Inc., the third issue stated above for the Transmission Corporation relating to taxability of wholesale sales of natural gas to West Virginia customers where the gas was produced without West Virginia is the only issue before the Court. The discussion below on this apportionment and discrimination issue for Transmission Corporation applies also to Columbia Gas of West Virginia, Inc. The Court now proceeds to discuss *seriatum* the three issues previously mentioned.

First, the mootness position advanced by the taxpayer is not well taken. The taxpayer in support of its position refers to the "corporation net income tax credit", and the

tenor of its argument is to the effect that more corporation net income tax has already been paid by the taxpayer for the periods in question than the sum of the business and occupation tax already paid plus the business and occupation tax assessed so that the "corporation net income tax credit" would, it is argued, completely offset any business and occupation tax liability.

The taxpayer misconceives the nature and timing of the credit provided by West Virginia Code, 11-24-9(a) [1969]. That subsection of the corporation net income tax statute provides a business and occupation tax credit against the corporation net income tax, not vice versa. The business and occupation tax credit may not be applied against the corporation net income tax liability until the amount of the business and occupation tax liability "imposed" (payable) is finally determined.

The obvious purpose of the business and occupation tax credit against the corporation net income tax is to prevent "double taxation" (in a non-technical sense) of the same income. If the income is initially subject to both taxes, the general rule is that only the business and occupation tax will be paid. Since it is measured by gross income instead of merely by net income, only the business and occupation tax will be paid because the business and occupation tax credit will entirely offset the corporation net income tax liability. There are cases, though, where the offset will not be complete because the credit applies only to that portion of the corporation net income tax that the taxable (net) income also subject to business and occupation tax bears to total net income. Thus, where some of the taxable (net) income is not also subject to business and occupation tax, *e.g.*, "passive" interest income from certificates of deposit, some corporation net income tax liability will remain in addition to the busi-

ness and occupation tax. In the case *sub judice* the taxpayer may have net income from activities not subject to business and occupation tax. If so, the business and occupation tax credit would not completely offset the corporation net income tax liability. If the business and occupation tax per the reassessment is affirmed, there is no "corporation net income tax credit" triggered to offset the business and occupation tax liability. Instead, the additional business and occupation tax liability would generate a claim for refund (via amended corporation net income tax returns) of corporation net income tax already paid on the net income from the wholesale sales business transactions in question. There is no moot issue. The interplay between the business and occupation tax statute and the corporation net income tax statute requires the sequence therein set forth and discussed above to be followed. That ultimately the taxpayer may receive a refund of corporation net income tax equal to any additional business and occupation tax liability found due does not create a moot issue.

As stated at pages 27-28 of the tax commissioner's administrative decision, had the Legislature provided for an *exemption* under the *business and occupation tax* statute for persons who are subject to the corporation net income tax, the present assessment would in fact be moot. Such is not the case. Likewise, the present assessment of business and occupation tax would, of course, be moot if, as stated by the tax commissioner at page 13 of its brief submitted to this Court, (1) the assessment was withdrawn by the tax commissioner or (2) the taxpayer conceded liability for the entire assessment. Again, neither of these events have occurred.

There is a justiciable issue as to business and occupation tax liability for the tax periods in question.

Similarly, an affirmation of the reassessment of business and occupation tax would not trigger a "corporation net income tax credit" which would entirely offset business and occupation tax liability and make collection of business and occupation tax penalty unconscionable since no tax itself would be due. Rather, a greater business and occupation tax credit would result, including credit for any business and occupation tax penalty independently concluded to be due. Such business and occupation tax credit may or may not entirely offset the corporation net income tax liability.

The nature of the business and occupation tax penalty and the manner in which it is waived is important. The penalty in question is not imposed by the tax commissioner but attaches automatically by virtue of the statute, Code, 11-13-11, second paragraph [1955]. It is a civil deficiency or delinquency, non-fraud addition to tax. For "reasonable cause" the tax commissioner "may [not "shall"] waive or remit in whole or in part these penalties."

Here the tax commissioner for proven reasonable cause waived almost all of the penalties in the Transmission Corporation case, including those relating to tax on the wholesale sales business in question, and waived all of the penalty in the other case herein (on that same issue). The only penalties not waived related to tax on transactions entirely unrelated to the primary issue on wholesale sales, for which transactions the taxpayer conceded liability and advanced merely oversight or the like as justification. The Court on these facts cannot say that the tax commissioner abused his discretion in not waiving these penalties.

The third and primary issue in this case involves the

business and occupation taxability of wholesale sales of natural gas to West Virginia customers in certain factual patterns denominated throughout this matter as "operational variables". In each of the operational variables for which the tax is contested the natural gas was transmitted through other states, either as "loop traffic", or after production or acquisition out of state or, in one instance, where only the ultimate consumption by customers of the taxpayer's customer occurs out of state. The tax commissioner's administrative decision at page 4-5 sets forth the facts with respect to this issue. At page 4 thereof is this summary of the facts:

> In every transaction picked up in the present assessment, the actual wholesale sale made by the taxpayer to its customer occurred in West Virginia. However, the actual production of such natural gas, whether by the taxpayer or by another producer, the acquisition of the gas by CGTC, when it was produced by another, the resale of the gas by the taxpayer's customer and the actual consumption of this gas could and did take place either within or without West Virginia depending on the incidents of each specific transaction.

The landmark opinion of the Supreme Court of the United States relating to state taxation of business with interstate aspects in the context of the commerce clause (U.S. Const. art. I., § 8, cl. 3) explicity [sic] and the due process clause (U.S. Const. amend. XIV, §1) implicity [sic] is *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 51 L. Ed. 2d 326, 97 S. Ct. 1076 (1977). *Complete Auto Transit* held that any state tax, however labeled ("privilege", "net income", etc.), will be sustained under the commerce clause (absent congressional action) "when the tax is applied to an activity with a substantial nexus

with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." 430 U.S. at 279, 51 L. Ed. 2d at 331, 97 S. Ct. at___. Applying this four-part test which emphasizes the practical "economic consequence[s]," 430 U.S. at 288, 51 L. Ed. at 337, 97 S. Ct. at___, this Court concludes that the West Virginia business and occupation tax is constitutional when applied to the wholesale sales business in question.

It is not controverted that there is substantial nexus and that the tax is fairly related to state services. The only activity taxed, the business of making wholesale sales, occurs within West Virginia. In addition, Transmission Corporation, a Delaware corporation, has its principal office and all of the other contacts within this state mentioned at page 9 of the administrative decision. Columbia Gas of West Virginia, Inc., a West Virginia corporation, with principal office in Columbus, Ohio, has three district offices and several area and divisional offices in this state. Numerous governmental services and protections are provided to both taxpayers.

It is asserted, on the other hand, that the business and occupation tax in this case fails the apportionment and discrimination parts of the *Complete Auto Transit* test. Paraphrasing from page 10 of the administrative decision, it is argued that section 2c of the business and occupation tax statute fails to provide a proper method of apportionment and, therefore, that taxing the entire gross proceeds derived from the wholesale sales in West Virginia is unconstitutional. It is further argued that whether a statute fairly apportions gross receipts is determined by economic consequences, not by legal formalism. By its economic consequences analysis, the taxpayer

asserts that for a statute to be valid, it must apportion income to recognize the value resulting from labor and capital employed in states lying in the stream of commerce. As an example, the taxpayer produced natural gas from its own wells in Kentucky and imported it into West Virginia for wholesale sales. The entire value of the production, and part of the value of transportation, came from human effort and property of the taxpayer in Kentucky. The taxpayer notes that West Virginia claims the right to tax all of that value because the point of wholesale sale is within this state. The taxpayer contends that this state should not be allowed to incorporate value accruing in upstream states to wholesale sales in West Virginia because undesirable cascading or pyramiding of tax results therefrom.

Despite *Complete Auto Transit's* general emphasis on economic consequences as opposed to statutory labels, the case does not require a value-added tax like that proposed by the taxpayer in lieu of an activity/gross receipts tax like the West Virginia business and occupation tax. *Complete Auto Transit* does not obliterate the distinction between the subject of a tax and its measure (base). Stated another way, the *nature* of the tax actually formulated by the state is still important and may not be ignored in favor of economic theory, especially, where, as here, that theory (the value-added tax) has been expressly rejected by the state's fiscal policy-formulators. The subject of the business and occupation tax is the privilege of conducting a particular classification of business within this state, here, the business of wholesale sales. The base portion of the measure of the tax for this classification is "gross income" defined in section 1 of the statute to include "gross receipts of the taxpayer derived from . . . sales . . . ."

That the activity/gross receipts tax is fairly apportioned is clear:

> A business and occupation tax levied on substantial activities of the taxpayer within the taxing state is a fairly apportioned tax becuase [sic] the local activities or transactions provide not only the tax nexus, but also form the boundary of the tax incident. This State's business and occupation tax is composed of a number of separate taxes on specific business activities occurring within the state. (footnoted list of activities omitted] [sic] The business and occupation tax does not give rise to the problems surrounding a state income tax, where some type of apportionment standard must be built into the tax statute to segregate local income from that derived from out-of-state sources. [citation omitted] [sic] Here, the business and occupation tax has its roots in the local transaction, and by its very nature carries its own proportionality.
>
> . . . .
>
> It is obvious from these decisions, as well as from *General Motors Corp.* [v. *Washington*, 377 U.S. 436, 440-441, 12 L. Ed. 2d 430, 435, 84 S. Ct. 1564, 1568 (1964),] and *Standard Pressed Steel* [*Co.* v. *Washington Department of Revenue*, 419 U.S. 560, 564, 42 L. Ed. 2d 719, 724, 95 S. Ct. 706, ____(1975),] that a state tax cannot be defeated on Commerce or Due Process Clause grounds merely because the value of out-of-state activity as it relates to the subject of the tax, whether the subject be products or services, is substantially greater than the value of in-state activity.
>
> The conclusion that must be reached is that as long as the out-of-state taxpayer is conducting relevant business activities within this State, it may be subject to a business and occupation tax on the receipts derived from the local trans-

> action, regardless of whether those receipts substantially exceed the value of the local transactions performed by the taxpayer in this State.

J. C. Penney Co. v. *Hardesty*, ____W. Va.____, 264 S.E. 2d 604, 618-19, 622 (1979) (Miller, J., concurring) (also see his n. 7, 264 S.E.2d at 721).

The majority opinion in *J. C. Penney*, 264 S.E.2d at 612, contains this illuminating quotation from a law review article by a leading authority in this field:

> 'Of course it would make analytic nonsense to talk about a "fairly apportioned" "unapportioned" tax if the concept of "apportionment" were intended to have any real meaning here. Instead, what seems to have happened in cases like *Standard* [*Pressed Steel Co.* v. *Washington Department of Revenue*, 419 U.S. 560, 42 L.Ed. 2d 719, 95 Ct. [sic] 706 (1975), *supra*,] is that the Court, while paying lip service to the apportionment principle, has ignored it in fact and has looked to other factors to determine the constitutionality of taxes imposed on the unapportioned gross receipts from interstate sales activity. Notwithstanding, doctrinal variations, and assuming that nexus requirements have been satisfied, over the past four decades gross receipts taxes on interstate sales have generally been sustained when imposed by the state to which the goods were shipped and prohibited when imposed by the state from which the goods were sent.'

The majority opinion in *J. C. Penney* then concludes at the same page:

> [A] gross receipts tax [on the sale] may be levied in the state of delivery if there are sufficient contacts to create a tax nexus but cannot be levied in the state of manufacture [or produc-

> tion]. This seems as reasonable as any other method of apportionment since its universal application will avoid the evil of double taxation and it has the further advantage of being easy to administer.

Aside from "loop traffic" situations, the wholesale sales in question are intrastate but occur in an almost continuous stream of interstate commerce. The Court deems it unnecessary to decide whether the loop traffic situations are to be treated as "intrastate", as held in *United Fuel Gas Co.* v. *Battle*, 153 W. Va. 222, 235-36, 238, 167 S.E.2d 890, 899-900 (1967), involving the taxpayer's predecessor, or are to be treated as "interstate", as held in *Central Greyhound Lines, Inc.* v. *Mealey*, 334 U.S. 653, 655-56, 92 L. Ed. 1633, 1637-38, 68 S. Ct. 1260, ... (1948). Even if the wholesale sales in question are considered to be interstate, they are taxable and are "fairly apportioned". The sales are "inshipments". Echoing the above-quoted remarks in the majority opinion in *J. C. Penney*, Justice Miller's concurring opinion, 264 S.E.2d at 616, notes that "there is no doubt that the present trend of the Supreme Court [of the United States and of the Supreme Court of Appeals of this State] is to uphold state taxes [imposed by the state of destination for the sales in question] against the claim that they impinge on the Commerce or Due Process Clauses."

Using the same language found in the majority opinion in *J. C. Penney*, 264 S.E.2d at 612, on the trend of sustaining gross receipts taxes when imposed by the destination state for the sales in question, *Virginia Foods of Bluefield, Virginia, Inc.* v. *Dailey*, ...W. Va....., 239 S.E.2d 770, 777 (1977), upheld the business and occupation tax on the business of making wholesale sales (inshipments from out of state). With respect to appor-

tionment, the Supreme Court of Appeals held: "We are, therefore, of the opinion, just as a unanimous Supreme Court was in *Standard Pressed* [*Steel, supra,*] that the tax in the instant case was apportioned exactly to the activities taxed, all of which were intrastate." 239 S.E. 2d at 776. Such is the case here, too.

There is also precedent for sustaining the tax without value-added allocation or apportionment in the form of opinions from the State of Washington, whose business and occupation tax is modeled after ours. Washington's business and occupation tax on wholesale sales business with interstate aspects was involved in *General Motors* and *Standard Pressed Steel, supra,* which resulted in opinions by the Supreme Court of the United States upholding the tax.

In *Standard Pressed Steel Co.* v. *Department of Revenue,* 10 Wash. App. 45 ___, 516 P.2d 1043, 1047 (1973), quoting from *Dravo Corp.* v. *Tacoma,* 80 Wash. 2d 590, 599, 406, P.2d 504, 510 (1972), the Washington intermediate appellate court held that the measure of the tax may include elements of value accruing at points outside the state, when that measure is fairly related to the activity sought to be taxed:

> 'The fact that the value which the gross receipts measure is, in large part, the result of activity *outside* the territorial limits of the taxing jurisdiction does not mean the gross receipts are not fairly related to the activity *within* the jurisdiction. There is no constitutional objection to resorting to extraterritorial elements in determining the *measure* of a tax [citations omitted]' (emphasis in original) [sic]

As stated by the tax commissioner at page 11 of his administrative decision:

> A gross receipts tax apportions by breaking up the business of a taxpayer into separate activities and allocating each activity to the state having the most significant connection with the activity. In this case, the wholesale sales occur in West Virginia. No other state can have more than an insignificant relationship with the sale. The activities taxed all occurred in West Virginia and the tax is properly apportioned by allocating the sales price to West Virginia.

West Virginia is not attempting to tax production or transportation activities occurring outside West Virginia. Other states do not tax the wholesale sales activity occurring exclusively in this State. Gross receipts from sales made in other states are not included in the measure of the tax in question. The value of the natural gas, as reflected in the sales price, is merely the measure of a tax imposed on the exclusively in-state wholesale sales transactions.

The taxpayer's "economic consequences" argument is purportedly supported by the use of that language in *Complete Auto Transit, supra.* The opinions of the West Virginia Supreme Court of Appeals discussed above, namely *Virginia Foods* and *J. C. Penney,* which were decided after *Complete Auto Transit,* do not invalidate the business and occupation tax on sales businesses involving inshipments because of lack of value-added apportionment. Nor is there invalidation for such reason in the only full opinion of the Supreme Court of the United States issued after *Complete Auto Transit* which involves a gross receipts tax challenged under the commerce clause.

In *Department of Revenue* v. *Association of Washington Stevedoring Companies,* 435 U.S. 734, 55 L. Ed. 2d

682, 98 S. Ct. 1388 (1978), the Supreme Court overruled two of its prior opinions on the same subject and held that, under *Complete Auto Transit*, Washington's business and occupation tax on the business of stevedoring services (loading and unloading cargo from ships) was not *per se* invalid because the tax was on the privilege of conducting business with interstate aspects. The Court also held that the taxpayers had failed to establish factually the invalidity of the tax under *Complete Auto Transit's* four-part test. With respect to the "fair apportionment" part of the test, the Court first indicated that, like in *Complete Auto Transit*, commerce clause analysis was involved despite the taxable activity's occurrence within the state: "[T]he stevedoring activity of respondents occurs completely within the state of Washington, even though the activity is a part of interstate or foreign commerce." 435 U.S. at 749, 55 L. Ed.2d at 696, 98 S. Ct. at ..... The Court then held that there was no showing that the tax was not "fairly apportioned": "The tax under challenge was levied solely on the value of the loading and unloading that occurred in Washington." 435 U.S. at 750, 55 L. Ed. 2d at 697, 98 S. Ct. at ..... That the Court did *not* mean by this statement to require a value-added apportionment is demonstrated by footnote number 18 wherein the Court approvingly stated that "Washington *apportions* its business and occupation tax to *activity within* the State. Taxes that are not so apportioned remain vulnerable to Commerce Clause attack." (underscoring added this Court) 435 U.S. at 749 n. 18, 55 L. Ed. 2d at 696, 98 S. Ct. at ____.

The taxpayer's "economic consequences" argument advanced herein fails to state *constitutional* requirements for the reasons stated in *Wisconsin* v. *J. C. Penney Co.*, 311 U.S. 435, 85 L. Ed. 267, 61 S. Ct. 246 (1940). That

case, decided on due process grounds, is a remarkable precursor to *Complete Auto Transit's* disregard of mere labels for a tax in favor of "its practical operation". 311 U.S. at 444, 85 L. Ed. at 270, 61 S. Ct. at_____. The Supreme Court therein upheld a tax labeled "For the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in this state." In so doing, the Court disregard [sic] the label of "privilege" tax only insofar as that term implied an exaction on *transactions* beyond Wisconsin's borders. Instead, the Court held that the nature of the tax by the statutory language *in toto* was such that "the incidence of the tax as well as its measure is tied to the earnings which the State of Wisconsin has made possible, . . ." 311 U.S. at 446, 85 L. Ed. at 271, 61 S. Ct. at_____. In the case before this Court, the measure of the tax is also "earnings"—"gross receipts" by our statute—from "business transacted in this state".

The opinion in *Wisconsin* v. *J. C. Penney* contains dicta which is applicable to the taxpayer's argument that "economic consequences" as used in *Complete Auto Transit* requires value-added apportionment:

> Constitutional provisions are often so glossed over with commentary that imperceptibly we tend to construe the commentary rather than the text. We cannot, however, be too often reminded that the limits on the otherwise autonomous powers of the states are those in the Constitution and not verbal weapons imported into it. . . .
>
> . . . Ambiguous intimations of general phrases in opinions torn from the significance of concrete circumstances, . . . do not alter the limited nature of the function of this Court when state taxes came before it. At best, the responsibility for devising just and productive sources of rev-

> enue challenges the wit of legislators. Nothing can be less helpful than for courts to go beyond the extremely limited restrictions that the Constitution places upon the states and to inject themselves in a merely negative way into the delicate processes of fiscal policy-making. We must be on guard against imprisoning the taxing power of the states within formulas that are not compelled by the Constitution but merely represent judicial generalizations exceeding the concrete circumstances which they profess to summarize.

311 U. S. at 444-45, 85 L. Ed. at 270-71, 61 S. Ct. at.....

Leaving the apportionment argument, the taxpayer also asserts that the tax in this case violates the discrimination part of the *Complete Auto Transit* test in three ways. The first asserted discrimination against interstate commerce involves the interplay between the wholesale sales business tax of section 2c and the natural resource production business tax of section 2a. The fifth paragraph of West Virginia Code, 11-13-2, as amended, provides that a person subject to the natural resource production business tax (including production of natural gas) provided by Code, 11-13-2a is not also subject to the wholesale sales business tax provided by Code, 11-13-2c. Thus a person who produces natural gas within West Virginia and who makes wholesale sales thereof within (or without) this state is liable for only the section 2a production business tax. On the other hand, a person, like the taxpayer in most cases, who produces (or whose suppliers produce) natural gas without West Virginia and who makes wholesale sales thereof within this state is liable for the section 2c wholesale sales business tax from which the West Virginia producer is exempt.

It must be noted, though, that the out-of-state producer is exempt from the West Virginia product on business tax. Thus the out-of-state producer is liable for the section 2c tax at a rate of 27 cents per $100.00 of gross income (25 cents per $100.00 prior to April 1, 1971), while the in-state producer is liable for the section 2a tax at the much higher rate of $8.63 per $100.00 of gross income ($7.85 per $100.00 prior to April 1, 1971). Therefore, there is no actual monetary discrimination against out-of-state producers by virtue of the fifth paragraph of Code, 11-13-2, as amended.

As stated at page 21 of the administrative decision "[t]axpayer's contention amounts to a request to view the wholesale [sales] exemption [for the in-state producer] isolated from the remainder of the business and occupation tax statute", specifically, the out-of-state producer's exemption from the production business tax of this state. In determining whether a given statutory provision is invalid because it discriminates against interstate commerce, the "proper analysis must take 'the whole scheme of taxation into account.' " *Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U.S. 64, 69, 10 L. Ed. 2d 202, 206, 83 S. Ct. 1201, ...(1963). The same case held that "equality for the purposes of competition and the flow of commerce is measured in dollars and cents, not legal abstractions. [footnote omitted]" 373 U.S. at 70, 10 L. Ed. 2d at 207, 83 S. Ct. at ..... As stated above, there is no discrimination against interstate commerce in dollars and cents as a result of the West Virginia business and occupation tax scheme as a whole.

The second asserted discrimination against interstate commerce arose during the first fifteen months of the assessment period (January 1, 1970 through March 31, 1971) when the then effective provisions of Code, 11-13-

2d (1959 W. Va. Acts. ch. 167, section 2d) allowed a deduction from a public utility's gross receipts (retail sales) equal to the amount of tax paid under section 2a on production of natural gas. An in-state natural gas producer/wholesaler, on the other hand, was liable for the section 2a production business tax without liability for the section 2c wholesale sales business tax (Code, 11-13-2, 5th paragraph). An out-of-state producer/in-state wholesaler was liable for only the section 2c wholesale sales business tax (without a deduction for out-of-state production business taxes, due to express prohibition against deduction of any taxes or any other costs of doing business in the Code, 11-13-1 definition of "gross income").

Again, there is no actual monetary discrimination in the whole tax scheme against the out-of-state producer/in-state wholesaler. The in-state producer/wholesaler also could not deduct business costs and paid at the much higher section 2a production business rate than the section 2c wholesale sales business rate of the out-of-state producer/in-state wholesaler. The in-state producer/utility (retailer) paid section 2a tax *and* section 2d tax, both measured by "gross income", but deducted the amount of section 2a tax. No discrimination in dollars and cents is shown.

The third and final assertion of discrimination against interstate commerce is likewise without merit. It involves a statutory allowance of apportionment for manufacturing occurring partially within and partially without the State of West Virginia. West Virginia Code, 11-13-2b, second paragraph, as amended, provides that, in those instances in which the same person partially manufactures, compounds, or prepares products within this state and partially manufactures, compounds, or prepares such products outside this state, the measure of the tax for the

privilege of manufacturing shall be (1) that porportion [sic] of the sale price of the product that the payroll cost of manufacturing within this state bears to the entire payroll cost of manufacturing the product or (2), at the taxpayer's option, the proportion of the sales value of the articles that the cost of operations in West Virginia bears to the full cost of manufacture of the articles.

The taxpayer in this case contends that this section of the business and occupation tax statute allows value-added apportionment in partial manufacturing situations, while the same statute does not provide for value-added apportionment for wholesalers of natural gas or other products imported into this state.

The taxpayer's argument fails, however, because the person partially manufacturing in this state and the person importing goods into this state for wholesale sales herein are not similarly situated. Apportionment is required in the partial manufacturing situation because part of the taxable *activity* occurs herein and part does not, and West Virginia cannot tax the extraterritorial *activity* even if the out-of-state activity is of the same nature (manufacturing) as the in-state activity being taxed. On the other hand, in the wholesale sales situation, West Virginia is taxing only the activity of conducting a wholesale sales business which occurs exclusively in this state. West Virginia is not taxing the activities of production or transportation occurring out of state. As stated previously, there is no constitutional infirmity with the *measure* of a tax containing extraterritorial values as long as the *subject* of the tax is within the exclusive jurisdiction of the taxing authority and the measure is fairly related in that a substantial local incident, sufficiently separable from the stream of interstate commerce has been subjected to the tax. Such is the case here.

In conclusion, the taxpayer's apportionment and discrimination arguments are without merit.

Accordingly, the rulings of the tax commissioner on all issues raised before this Court are affirmed.

An order in conformity herewith should be promptly tendered for entry. Such order should make this letter memorandum of opinion a part thereof. A copy for that purpose may be obtained from my secretary upon presentation of the order.

Very truly yours,

/s/ ODEN F. GOSHORN

Judge

OFG/ny

ADMINISTRATIVE DECISION OF DAVID C. HARDESTY, JR., THEN TAX COMMISSIONER OF WEST VIRGINIA

(Docket No. 77-112B, June 29, 1979)

BEFORE THE TAX COMMISSIONER OF THE STATE OF WEST VIRGINIA

In the Matter of the Petition of	) BUSINESS TAX) DIVISION
COLUMBIA GAS TRANSMISSION CORPORATION	) DOCKET #77-112 B
P. O. Box 1273 Charleston, W. Va. 25325	) File No. 31 080 2435 001

HEARING EXAMINER HOLDING HEARING: Frank Skinner

TAXPAYER REPRESENTED BY:	H. L. Snyder, Attorney at Law, CGTC
	Dean Gerwig, Attorney at Law, CGWV
	J. P. Hayes, Director of Taxes and Insurance, CGTC
	George S..nger, Manager of Corporate Taxes, CGTC
	John Cantrell, Manager of State and Local Taxes, CGTC
	Robert M. Bennett, Director of Planning, CGTC
	Raymond R. Thomas, Director of Taxes and
	C. Lowell Harriss, Profes- Insurance, CGWV
	sor of Economics, Columbia University
	Kenneth Tawney, Law Clerk
	David Higgins, Attorney at Law, Observing
	Beverly Ann Robertson, Attorney at Law Observing
	Dennis R. Leyden, Economist, FEC Associates
TAX DEPARTMENT REPRESENTED BY:	Ann Chrisman, Staff Attorney
	Charles I. Jones, Jr., Staff Attorney
	Vernon East, Auditing Section

Peggy Musgrave,
Economist

DATE, TIME AND PLACE OF HEARING:

June 14, 1977, 9:00 a.m., EDT

June 15, 1977, 9:00 a.m., EDT

October 5, 1977, 9:00 a.m., EDT

State Tax Department
Office of Hearings and Appeals
1217 Quarrier Street
Charleston, West Virginia 25305

ADMINISTRATIVE DECISION

Pursuant to a field audit conducted by the Business Tax Division, Richard L. Dailey, then Tax Commissioner of the State of West Virginia, issued an assessment against Columbia Gas Transmission Corporation (herein also referred to as CGTC, Columbia Transmission or the taxpayer) on January 12, 1977 for business and occupation tax in accordance with the provisions of Chapter 11, Article 13 of the Code of West Virginia of 1931, as amended. The assessment was for the years 1970 through 1974 for tax in the amount of $1,095,355.70 with penalty thereon in the amount of $565,870.96 for a total assessed tax and penalty in the amount of $1,661,226.66.

Taxpayer filed a timely petition for reassessment and the cause was regularly set for hearing after due notice was given to and received by the taxpayer.

The Hearing Examiner, Frank Skinner, having determined that all proper notices and documents required by law had been timely filed, called the matter on to be heard

at 9:00 a.m., EDT on the 14th day of June, 1977, in the State Tax Department at Charleston, West Virginia. The hearing on this matter was reconvened by Hearing Examiner Skinner on June 15, 1977, and on October 5, 1977 in order to complete testimony regarding the issues raised in the taxpayer's petition for reassessment.

PRELIMINARY STATEMENT

Columbia Gas Transmission Corporation is engaged in the business of transmitting natural gas in interstate and intrastate commerce and of selling natural gas at wholesale. The taxpayer began its business operations on July 1, 1971 as the successor by merger to United Fuel Gas Company (UFG), Atlantic Seaboard Corporation (AS), Kentucky Gas Transmission Corporation (KGTC), Manufacturers Light and Heat Company (MLH), and Cumberland and Allegheny Gas Company (CA). In that portion of the audit period prior to July 1, 1970, the amounts found to be due in the present assessment were attributable to alleged reporting errors committed by the taxpayer's predecessors, UFG, MLH and CA.

The present assessment arose as the result of a State audit of the taxpayer's books and records which indicated that the taxpayer had outstanding business and occupation tax liabilities under the oil production, natural gas production, other natural resource products production, retail, wholesale, service and rents and royalties classifications during the audit period. At the hearing held on this matter, the taxpayer's counsel did not contest the portion of the assessment attributable to amounts picked up under the various production classifications, and under the retail and rentals classifications. In addition, the tax payer's representative conceded that the taxpayer had improperly failed to report the sale of supplies to non-

affiliated customers under the wholesale classification in the years 1970 through 1974, and had improperly omitted sales of appliances in the period January 1, 1970 through September 30, 1970 and income accruing due to adjustments made under the Natural Gas Production classification in the years 1970 through 1974 under the service classification. However, the taxpayer contested all other amounts picked up in the audit as wholesale or service income items.

I. Wholesale Sales of Natural Gas:

The wholesale portion of the assessment remaining in contest is almost exclusively attributable to sales of natural gas by CGTC or its predecessors to both affiliated and non-affiliated utility companies. In every transaction picked up in the present assessment, the actual wholesale sale made by the taxpayer to its customer occurred in West Virginia. However, the actual production of such natural gas, whether by the taxpayer or by another producer, the acquisition of the gas by CGTC, when it was produced by another, the resale of the gas by the taxpayer's customer and the actual consumption of this gas could and did take place either within or without West Virginia depending on the incidents of each specific transaction. The taxpayer's analysis of the operational variables which could occur prior to and after the actual wholesale transactions being taxed by the State in the present assessment are elaborated upon in Petitioner's Exhibit Nos. 41 through 45.

Specifically, the assessment includes tax on gross income derived from sales of gas from Operational Variables 3-4, 7-8, 11-12, 15-16 and 19-20. Operational Variable [sic] 3 and 4 involve southwest gas taken in Kentucky, imported by the taxpayer into West Virginia and sold at

wholesale in this State to either Gas Transport for export, resale and consumption in Ohio or to Columbia Gas of West Virginia, Inc. (Columbia-W.Va.) for resale and consumption in West Virginia. Operational Variables 7 and 8 involve southwest gas purchased by the taxpayer and imported into West Virginia by Tenneco, Inc. for subsequent sale by the taxpayer to either Gas Transport for export, resale and consumption in Ohio or to Columbia-W.Va. for resale and consumption in West Virginia. Operational Variables 11 and 12 involve gas purchased in West Virginia by the taxpayer, exported to Kentucky and transported back into West Virginia for eventual wholesale sale to either Bluefield Gas for export, resale and consumption in Virginia or to Columbia-W.Va. for resale and consumption in West Virginia. Operational variable 15 involves the purchase of West Virginia produced gas sold at wholesale by the taxpayer to Gas Transport for export resale and consumption in Ohio. The taxpayer concedes the taxability of Operational Variable 16. Finally, Operational Variables 19 and 20 involve gas produced in Kentucky by the taxpayer which is subsequently sold at wholesale in West Virginia to Gas Transport for export, resale and consumption in Ohio or to Columbia-W.Va. for resale and consumption in this State.

Operational Variables 1-2, 5-6, 9-10, 13-14, 17-18 and 21-22 were not included in the assessment as they all involved wholesale sales of gas after it had already left the State. Operational Variables 23 and 24 were also excluded from the assessment as they represented wholesale sales of gas produced in West Virginia by the taxpayer [See Code §11-13-2, 1964 Regulation BOT 6.03, 1974 Regulation BOT 1.2(c)(1)].

The flow of the gas from the points of production to ultimate consumers is comingled but the volume of gas

sold to the wholesale customers is determinable by means of measurement facilities owned by the taxpayer. Individual meter readings are taken from each of several hundred such facilities located within the State of West Virginia. These measuring devices register the gas flow information and print it out on a chart which is then forwarded to the Charleston headquarters for summaries of the volumes registered at each delivery point and the applications of the proper rates for billing purposes to be made. (T. 108-109). In turn, the wholesale customers, such as Columbia-W.Va. bill their customers for the gas sold to them. The taxpayer's wholesale customers bill their customers at a rate approved by a regulatory agency. This may or may not be the same rate form utilized by the taxpayer. (T. 116-117).

II. Wholesale Sales of Materials to Columbia of West Virginia:

The taxpayer, or its predecessor, United Fuel, made certain purchases of materials for its own use or for subsequent resale to both affiliated and non-affiliated companies. The needs of both the taxpayer and the affiliated companies were ascertained and materials were purchased in high volume. The warehousing of most materials and supplies so ordered was done at the taxpayer's St. Albans Operating Center. As each affiliate requested supplies, the warehouse personnel charged it with the manufacturing or jobber's cost, plus an allocated percentage to cover warehousing costs. The warehouse personnel took care of actually shipping the material to the field location needing it. Delivery was normally accomplished in operating center trucks with company drivers. Actual costs were maintained in an account designated 154 and the overhead expenses were maintained in an account

designated 163. The purchasing affiliates were billed once a month.

There were minor sales of materials to non-affiliated companies which were processed through the same accounts. If the customer could not subsequently replace the specific item, it was then billed at the replacement cost which the taxpayer would incur. The taxpayer conceded the taxability of these transactions but asserted that the purchases and transfers to the affiliated companies did not constitute the exercise of a privilege subject to tax. The audit placed the cost of materials and supplies plus a 15% mark-up for overhead under the wholesale sales classification.

III. Well-Tending Expenses:

The taxpayer and other parties co-owned certain wells in which the taxpayer incurred the operational expenses. These expenses were in turn billed to the respective owners by the taxpayer based on their percentage of ownership. The taxpayer reported this income under the service classification and remitted the tax due. The Tax Examiner included in the audit the taxpayer's share of these expenses based on its ownership percentage in the wells.

IV. Handling Charges on Drip Gasoline:

In the Rocky Fork Field, the taxpayer and other parties owned wells which produced natural gas. As part of this production, drip gasoline was obtained which was subsequently sold to Ashland Oil. Two pipelines, both owned by the taxpayer, were utilized for transmission; one for natural gas and the other for drip gasoline. Ashland Oil was billed for the drip gasoline and the proceeds were in turn distributed to the various well share

owners. The taxpayer separately billed a handling charge to cover its expenses. The taxpayer reported its share of the drip gasoline sales under the production classification but failed to report the handling charges. The taxpayer conceded the taxability of these handling charges under the service classification but objected to the computation of these charges by the Tax Examiner. The total proceeds received from Ashland Oil for the drip gasoline were considered as handling charges and taxed under the service classification.

STATEMENT OF ISSUES

The preceeding [sic] discussion of the facts presented a number of issues to be resolved. In addition, the taxpayer raised other related issues. These issues may be delineated as follows:

1. Whether the taxpayer's wholesale sales in West Virginia of natural gas obtained outside of this State are subject to Business and Occupation Tax.
2. Whether the supplying of materials by the taxpayer to its affiliates for an amount equal to the materials cost plus a warehousing fee amounted to a taxable business activity.
3. Whether the taxpayer's share of expenses incurred for well-tending services for co-owned wells is subject to Business and Occupation Tax.
4. Whether the handling charges for drip gasoline should include the entire receipts of the sale of the drip gasoline.
5. Whether the Business and Occupation Tax assessment should be dismissed for any year in which the Corporate Net Income Tax previously remitted exceeds the total of the

Business and Occupation Tax paid and assessed.

6. Whether the penalties should be waived in whole or in part for reasonable cause.

The above stated general issues may have one or more sub-issues which will be explored more fully as the issues are decided. The facts pertaining to this case were extensively developed by the oral testimony presented at three hearings and thoroughly analyzed in subsequent briefs filed by both sides. This opinion will refer only to the more salient facts presented by the parties.

DETERMINATIONS

Issue 1: Whether the taxpayer's wholesale sales in West Virginia of natural gas obtained outside of this State are subject to Business and Occupation Tax.

Columbia Transmission Corporation makes wholesale sales of natural gas in West Virginia to four customers: Columbia of West Virginia, Bluefield Gas Company, Cameron Gas Company and Gas Transport, Inc. The wholesale sales in controversy are the sales in which the natural gas is brought in West Virginia from outside and then is subsequently removed from this State by the taxpayer's customer. It is undisputed that the wholesale sales took place in West Virginia between separate legal entities.

As noted by taxpayer's counsel (taxpayer's brief, p. 74) and State's counsel (brief, p. 7), *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977) restates the four ways in which a taxpayer may attack a State tax on constitutional grounds:

(a) The activity is not sufficiently connected to the State to justify a tax;

(b) The tax is not fairly related to the benefits provided the taxpayer;

(c) The tax discriminates against interstate commerce; or

(d) The tax is not fairly apportioned.

The taxpayer's counsel both at the hearing (transcript, p. 97) and in his reply brief (p. 2) concedes that there is no controversy over the doctrine of nexus. The nexus alluded to by the State (State's brief, p. 2-4, 21) and conceded by the taxpayer includes: general headquarters and offices located within the State; approximately $700 million in net utility plant including offices, pipelines, trucks, bulldozers, compressor stations, etc.; over a thousand resident employees involved in administration, repair, surveillance, right-of-way clearing and meter chart reading and billing; extensive storage of natural gas; and its contracts were signed within West Virginia. In light of the substantial nexus between the taxpayer and the State, it is initially determined that the first test of *Complete Auto Transit* is met.

The taxpayer fails to raise any argument that the tax is not fairly related to the benefits provided the taxpayer. However, it is noted that the State provides numerous governmental services and protections to the taxpayer and it is thus determined that the second test of *Complete Auto Transit* is met.

The taxpayer argues that the Section 2c of the Business and Occupation Tax law fails to provide a proper method of apportionment and therefore that taxing the entire gross proceeds derived from the wholesale sales in West Virginia in [sic] unconstitutional. The taxpayer further argues that whether a statute fairly apportions gross receipts is determined by economic consequences, rather

than by legal formalism. By its economic consequences analysis, the taxpayer asserts that for a statute to be valid, it must apportion income to recognize the value resulting from labor and capital employed in states lying in the stream of commerce. As an example, the taxpayer produced natural gas from its own wells in Kentucky and imported it into West Virginia for wholesale sales. The entire value of the production, and part of the value of transportation, came from human effort and property of the taxpayer in Kentucky. The taxpayer notes that West Virginia claims the right to tax all of that value because the point of wholesale sale is within this State (taxpayer's brief, p. 86). The taxpayer contended that the State should not be allowed to incorporate value accruing in upstream states to taxable West Virginia wholesale transactions because this creates the undesirable effect of tax cascading.

Upon a review of the extensive expert testimony presented and the legal authorities cited by both sides, it is determined that the tax assessed is clearly apportioned properly under recognized constitutional principles. A gross receipts tax apportions by breaking up the business of a taxpayer into separate activities and allocating each activity to the State having the most significant connection with the activity. In this case, the wholesale sales occur in West Virginia. No other state can have more than an insignificant relationship with the sale. The activities taxed all occurred in West Virginia and the tax is properly apportioned by allocating the sales price to West Virginia.

Support for this determination can be found in numerous court cases, both on the federal and state level. In *Standard Pressed Steel Co.* v. *Department of Revenue*, 10 Wash. App. 45, 516 P.2d 1043 (1973), the Washington

Court upheld the assessment of business and occupation tax against a Pennsylvania manufacturer of industrial and aerospace fasteners for sales to the Boeing Company located in Washington even though Standard Pressed Steel Co. retained only one employee within the State. The Washington Court held that the measure of the tax may include elements of value accruing at points outside the State, when that measure is fairly related to the activity sought to be taxed. The Washington Court stated that:

> It might be argued that since gross receipts from plaintiff's sales to the Boeing Company represent extensive manufacturing and operational activities in Pennsylvania and California, such gross receipts are not fairly related to the activities of Mr. Martinson. However, this contention was discussed in *Dravo Corp.* v. *Tacoma*, 80 Wash. 2d 590, 599, 496 P.2d 504, 510 (1972), as follows:
>
> "The fact that the value which the gross receipts measure is, in large part, the result of activity *outside* the territorial limits of the taxing jurisdiction does not mean the gross receipts are not fairly related to the activity *within* the jurisdiction. There is no constitutional objection to resorting to extraterritorial elements in determining the *measure* of a tax. *General Motors Corp.* v. *State*, 60 Wash. 2d 862, 874, 376 P.2d 843 (1962), aff'd, in *General Motors Corp.* v. *Washington*, *supra*; *Wisconsin* v. *J. C. Penney Co.*, *supra*, [311 U.S. 435] at 445 [61 S.Ct. 246, 85 L. Ed. 267], rehearing denied, 312 U.S. 712, 61 S.Ct. 444, 85 L. Ed. 1143 (1941); *Great Atl. & Pac. Tea Co.* v. *Grosjean*, 301 U.S. 412, 425, 57 S.Ct. 772, 81 L. Ed. 1193, 112 A.L.R. 293 (1937)." *Id.*, at 1047.

Standard Pressed Steel subsequently appealed to the

United States Supreme Court which in 1975 affirmed the Washington Court opinion. See: *Standard Pressed Steel Co.* v. *Washington Department of Revenue*, 419 U.S. 560, 95 S.Ct. 706, 422 Ed [sic] 719 (1975).

Taxpayer's counsel finds objection to the *Standard Pressed Steel* decision because it was "a murky opinion (one of the last by Mr. Justice Douglas, prepared when he was so ill that the decision was announced by the Chief Justice", — taxpayer's reply brief, p. 9) and because it applied to retail sales rather than wholesale sales. While Mr. Justice Douglas prepared the opinion, the opinion was unanimous and has been subsequently cited by the Supreme Court in *Complete Auto Transit, Inc., supra*, p. 1078; *Nat. Geographic Soc.* v. *Cal. Bd. of Equal.*, 97 S.Ct. 1386, 1390 (1977) and *Moorman Mfg. Co.* v. *Bair*, 98 S.Ct. 2340 (1978) as well as by the West Virginia Supreme Court of Appeals in *Virginia Foods of Bluefield, Va., Inc.* v. *Dailey*, ——W.Va.——, 239 S.E.2d 770 (1977).

In *Moorman Manufacturing*, the Supreme Court upheld Iowa's single-factor destination sales formula for the apportionment of net income of an interstate business engaged in the manufacture and sale of feed for livestock and poultry during the years 1968 through 1972. None of Moorman's manufacturing plants were located in Iowa, but it maintained six warehouses in Iowa that were supplied with its products manufactured in Illinois. Under the Iowa statute, the taxpayer was required to apportion its net income solely on the basis of a destination sales formula. This resulted in an allocation of approximately 50% more income to Iowa than would have been the case if the customary three-factor formula were applied. In reference to this situation, the Court stated:

> . . . Yet even were we to assume that the Illinois activities made some contribution to the profitability of the Iowa sales, appellant's claim that the Constitution invalidates an apportionment formula whenever it may result in taxation of some income that did not have its source in the taxing State is incorrect. Id., at 2344.

The Court also noted that the State of Iowa could have imposed a valid gross income tax touching Moorman's sales similar to that imposed by the State of Washington.

> Finally, it would be an exercise in formalism to declare appellant's income tax assessment unconstitutional based on speculative concerns with multiple taxation. For it is evident that appellant would have had no basis for complaint if, instead of an income tax, Iowa had imposed a more burdensome gross receipts tax on the gross receipts from sales to Iowa customers. In *Standard Pressed Steel Co.* v. *Department of Revenue*, 419 U.S. 560, 95 S.Ct. 706, 42 L.Ed.2d 719, the Court sustained a tax on the entire gross receipts from sales made by the taxpayer into Washington State. Because receipts from sales made to States other than Washington were not included in Standard Steel's taxable gross receipts, the Court concluded that the tax was " 'apportioned exactly to the activities taxed.' " Id., at 564, 95 S.Ct. at 709.
>
> In this case appellant's actual income tax obligation was the rough equivalent of a 1% tax on the entire gross receipts from its Iowa sales. Thus, the actual burden on interstate commerce would have been the same had Iowa imposed a plainly valid gross receipts tax instead of the challenged income tax. Of more significance, the gross receipts tax sustained in *Standard Pressed Steel and General Motors Corp.* v. *Washington*, 377 U.S. 436, 84 S.Ct. 1564, 12 L.Ed.2d 430, is

> inherently more burdensome than the Iowa income tax. It applies whether or not the interstate concern is profitable and its imposition may make the difference between profit and loss. In contrast, the income tax is only imposed on enterprises showing a profit and the tax obligation is not heavy unless the profits are high.
>
> Accordingly, until Congress prescribes a different rule, Iowa is not constitutionally prohibited from requiring taxpayers to prove that application of the single-factor formula has produced arbitrary results in a particular case. Id., at 2348

In consideration of these Court opinions, it is determined that a tax is not unconstitutional merely because it may be imposed on sales within the taxing state that also include value from without the taxing state. Just as "receipts from sales made to States other than Washington were not included in Standard Steel's taxable gross receipts", West Virginia has not included taxpayer's receipts from sales made to States other than West Virginia.

The present wholesale sales are subject to a tax which is "apportioned exactly to the activities taxed". This principle enunciated by the United States Supreme Court has been adopted by the West Virginia Supreme Court of Appeals. In upholding the business and occupation tax on the wholesale sales of Virginia Foods into West Virginia, the Court in *Virginia Foods of Bluefield* stated:

> We are, therefore, of the opinion, just as a unanimous Supreme Court was in *Standard Press*, that the tax in the instant case was apportioned exactly to the activities taxed all of which were intrastate. *Supra*, at 776.

It is further noted, contrary to the taxpayers counsel's assertion, that the sales made by Standard Pressed Steel were wholesale sales. Additionally, the cases of *General Motors Corporation* v. *Washington*, 84 S.Ct. 1564 (1964) and *Virginia Foods* have upheld the taxation of wholesale sales. The distinction the taxpayer makes between retail and wholesale sales is without merit.

It is finally determined that taxpayer's economic argument borders on the type of abstractions that courts have abstained from considering.

In *Northwestern States Portland Cement Company* v. *Minnesota*, 358 U.S. 450 (1959), a case dealing with an apportioned net income tax as applied to a foreign corporation, the Court stated at page 463:

> There is nothing to show that multiple taxation is present. We cannot deal in abstractions. In this type of case, the taxpayers must show that the formula places a burden upon interstate commerce in a constitutional sense. This they have failed to do.

As noted by the Court in *Virginia Foods*:

> Moreover, the law requires a taxpayer making a multiple or cumulative tax burden claim to show it has been, in fact, taxed on the same income by two or more states. *Standard Press Steel Co.* v. *State of Washington Dept. of Revenue* 419 U.S. 560, 95 S.Ct. 706, 42 L.Ed.2d 719 (1975); *General Motor Corp.* v. *Washington*, 377 U.S. 436, 84 S.Ct. 1564, 12 L.Ed.2d 430 (1964); *Northwestern States Portland Cement* v. *Minnesota*, 358 U.S. 450, 79 S.Ct. 357, 3 L.Ed. 2d 421 (1959). *Supra*, at 776.

Therefore, it is determined that Columbia Transmission has failed to show the gross receipts in question are

subject to tax by any state other than West Virginia. The taxpayer's counsel asks the Tax Department to "deal in abstractions" when it contends that the economic analysis proposed by the taxpayer must be considered. The economic analysis proposed by the taxpayer is not a valid consideration in this matter because the incidence of the business and occupation tax is upon specific wholesale natural gas sales transactions entered into and completed solely in West Virginia. The value accruing on the gas, as reflected in the sales prices, is merely the measure of a tax imposed on the exclusively in-state wholesale sales transactions. Therefore, it is irrelevant that a portion of this value is created outside West Virginia because the tax is imposed solely on wholesale activities taxable only by this State. As a result, the taxpayer has failed to show the creation of a multiple burden by the imposition of the business and occupation tax on these sales and the tax must be viewed as properly apportioned to the activities sought to be taxed. So, the third requirement of *Complete Auto Transit* has been met.

Finally, taxpayer argues that the application of Section 2c unconstitutionally discriminates against interstate commerce in three situations. The first asserted discrimination involves the interplay between the wholesale tax of Section 2c and the production tax of Section 2a. A taxpayer who is subject to tax on his production activities in West Virginia is relieved from also paying the wholesale sales tax on any subsequent sales of the produced item under Code §11-13-2 which provides in part:

> . . . any person exercising any privilege taxable under section two-a, two-b, two-l or two-m of this article and engaging in the business of selling his natural resources, manufactured pro-

> ducts or electricity to producers of natural resources, manufacturers, wholesalers, jobbers, retailers or commercial consumers for use or consumption in the purchaser's business shall not be required to pay the tax imposed in section two-c of this article.

A taxpayer who produces gas outside West Virginia and sells the same in West Virginia is subject to tax on his wholesale sales. Thus, gas produced in West Virginia by Transmission's own wells is subject to the production tax but the taxpayer is not required to pay tax on its wholesale sales within this State. The gas either produced by Transmission outside this State or purchased from other producers is subject to the Section 2c taxation upon sale within West Virginia by Transmission. The second situation in which the taxpayer argues discrimination arose during the first 15 months of the assessment period when the then effective provisions of Section 2d (1959 W. Va. Acts, c. 167, §2d) allowed a deduction from an [sic] utility's gross receipts equal to the amount of tax paid under Section 2a on production of natural gas. Section 2d did not allow a comparable deduction attributable to severance or production taxes paid to other States, whether by the utility selling at retail or one of its direct or indirect wholesale suppliers. The pertinent part of Section 2d effective until amendment in 1971 read:

> Upon any person engaging or continuing within this State in any public service or utility business . . . there is likewise hereby levied and shall be collected taxes on account of the business engaged in equal to the gross income of the business multiplied by the respective rates as follows: . . . natural gas companies, three and nine tenths per cent on the gross income, said gross income for the purpose to be determined by deducting from gross income from all sales of

> gas to consumers the amount of the tax paid by the taxpayer under section two-a [11-13-2a] of this article on the production of the same gas;
>
> . . . .

United Fuel, predecessor to Columbia Transmission, was a public utility during the first ten months of the period the Section 2d deduction was permitted. Thereafter United Fuel sold gas at wholesale to Columbia of West Virginia. During the entire 15 month period the deduction was taken so far as possible (Transcript p. 128). The taxpayer asserts descrimination [sic] because its suppliers were not allowed to deduct severance taxes paid to other states.

The third claim of discrimination concerns Section 2b which permits a manufacturer who partially manufactures both within and without the State to allocate its income by prescribed cost methods so that only the manufacturing performed in West Virginia is taxed. Section 2c does not allow a similar allocation to West Virginia wholesalers such as Transmission Corporation and thus the taxpayer argues there is discrimination between two forms of interstate commerce by the same business and occupation tax.

In resolving questions of discrimination, the Supreme Court has held on numerous occasions that a state may not impose a tax which discriminates against interstate commerce either by providing a direct commercial advantage to local business, that is, a state may place no greater burden upon interstate commerce than the state places upon competing intrastate commerce of like character or subject interstate commerce to the burden of "multiple taxation." *Complete Auto Transit, supra; Boston Stock Exchange* v. *State Tax Commissioner*, 97 S.Ct.

599 (1977); *Northwestern States Portland Cement Co., supra.*

It has been previously determined that the taxpayer has failed to show a multiple taxation burden and therefore it remains to be decided whether the imposition of tax under Section 2c discriminates against Columbia Transmission by providing a direct commercial advantage to local business; that is, places a greater burden upon out-of-state producers who sell gas in West Virginia than it places upon in-state producers who also sell gas in West Virginia.

In determining whether a given statutory provision is invalid because it discriminates against interstate commerce, the proper method of analysis is to consider the intent and effect of the statutory scheme as a whole. A particular statutory provision may not be viewed in isolation. See: *Halliburton Oil Well Cementing Company* v. *Reilly*, 83 S.Ct. 1201 (1963). As noted by the Court in *Best & Co.* v. *Maxwell*, 61 S.Ct. 334, 335 (1940):

> In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in practical operation work discrimination against interstate commerce.

In *State of Wisconsin* v. *J. C. Penny Co.*, 61 S.Ct. 246, 249 (1940), the Court stated:

> The Constitution is not a formulary. It does not demand of states strict observance of rigid categories nor precision of technical phrasing in their exercise of the most basic power of government, that of taxation. For constitutional purposes the decisive issue turns on the operating incidence of a challenge tax. A state is free to pursue its own fiscal policies, unembarassed by the Constitution, if by the practical operation of

> a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has confirmed by the fact of being an orderly, civilized society.

Furthermore, the Court in *Halliburton Oil*, stated:

> However, equality for the purposes of competition and the flow of commerce is measured in dollars and cents, not legal abstractions. *Supra*, at 1204

In light of above court pronouncements, it is determined that the business and occupation tax as a whole must be considered and the scheme of taxation reviewed in terms of actual "dollars and cents, not legal abstractions." The question thus becomes whether the tax imposed under Section 2c creates an undue burden on out-of-state gas producers who sell gas in West Virginia when such sales are compared to the sales of West Virginia gas producers with whom they compete for West Virginia gas sales.

The applicable tax rates are $.27/$1.00 (.25/100 prior to April 1, 1971) for wholesale sales of gas and $8.63/$1.00 ($7.85/$100 prior to April 1, 1971) for West Virginia gas production. As previously noted a West Virginia producer which is subject to tax under the production classification (Section 2a) is not required to pay the tax under the wholesale sales classification (Section 2c). The clear reason for exempting West Virginia producers from the second tax is to alleviate the pyramiding effort of the business and occupation tax. The Washington State cases: *Crown Zellerbach* v. *State*, 45 Wash. 2d 749, 278 P. 2d 305 (1954) and *Public Utility District No. 2 of Grant County* v. *State*, 82 Wash. 2d 232, 510 P. 2d 206 (1973), appeal dismissed for want of a substantial fed-

eral question, 94 S.Ct. 833 (1973) involved exemptions arising from anti-pyramiding statutory provisions upheld as not being discriminatory when viewed within the whole scheme of taxation. While the gas-producers exemption lowers the tax burden for West Virginia gas producers it does not create a discriminatory tax advantage for them over out-of-state gas wholesalers. The scheme of taxation pertaining to natural gas sales in West Virginia is to tax the West Virginia producer/seller of natural gas at a much higher rate than the wholesaler of natural gas whether such wholesaler is in-state or out-of-state.

It is further noted that taxpayer has not shown by specific computations how exemption of in-state producers from wholesale tax has created a competitive economic advantage for these instate producers. The taxpayer is clearly dealing in legal abstractions. There has been no showing of "dollars and cents" discrimination as shown in *Halliburton Oil*. Taxpayer's contention amounts to a request to view the wholesale exemption isolated from the remainder of the business and occupation tax statute. There may be economic burdens flowing from the present tax scheme but no actual discrimination has been shown. Therefore, it is determined that the final test of *Complete Auto* has beeen satisfied. As a result, the taxation of these wholesale sales is constitutionally valid and must be affirmed.

A second issue under the wholesale sales classification involves "loop traffic" arising from operational variables 11 and 12. These variables involve West Virginia gas produced by another and exported from this State before delivery to Transmission Corporation, after which CGTC brings the gas back into West Virginia for wholesale sale.

"Loop traffic" was involved in the *United Fuel Gas Co. v. Battle*, 153 W. Va. 222, 167 S.E. 2d 890 (1969) case wherein the West Virginia Supreme Court of Appeals affirmed the taxation of the same. In that case the Court found that:

> . . . Wholesale sales in this State by a public utility to wholesale customers of gas produced in this State by other producers, after such gas has been transported by such utility to Kentucky and then returned to this State for transportation and sale by such wholesale customers to consumers within or without this State are not a subject of interstate commerce but instead are local or intrastate transactions and as such are taxable at the rate provided by Section 2c for wholesale sales of gas produced in this State; and wholesale sales in this State by such utility to wholesale customers of gas produced in this State by other producers before such gas has been transported by such wholesale customers from this State to any other state for sale to consumers in that State or for sale to consumers in this State are not a subject of interstate commerce but instead are local or intrastate transactions and as such are taxable at the rate provided by Section 2c for wholesale sales of gas produced in this State. With respect to such sales the transportation of the gas had ended or had not occurred at the time such sales were made. *Id.*, at 241

While taxpayer's counsel disagrees with the opinion of the Court in the *United Fuel* on this issue ("On this point, therefore, the *United Fuel* decision was simply wrong"—taxpayer's brief, p. 108), it is determined the *United Fuel* case is controlling on this issue and the taxation of wholesale sales involving "loop traffic" is also affirmed.

Issue 2. Whether the Supplying of Materials by the Taxpayer to its Affiliates for an Amount Equal to the Materials Cost Plus a Warehousing Fee Amounted to a Taxable Business Activity.

Transmission Corporation purchased certain supplies and materials in volume and subsequently transferred a portion of these supplies and materials to its affiliated companies and occasionally to its customers. The affiliated companies were charged a fee based on cost plus a mark-up to cover expenses and the customers were charged the list price or replacement cost of each item.

While conceding the taxability of transfers to its customers, the taxpayer objected to the taxability of the transfers made to the affiliated companies on the grounds that the transactions did not constitute the exercise of a business privilege because there were no true "sales" or "gross income" to the taxpayer as those terms find definition in Chapter 11, Article 13, Section 1 of the Code. In the alternative, the taxpayer argued that assuming the cost of materials and supplies withdrawn from stock amounted to "gross income" by "reimbursement", the statute cannot be retroactively applied to such gross income prior to April 1, 1971, the effective date of the amendment to Code §11-13-1 imposing Article 13 specifically to "reimbursed costs".

Upon a review of the testimony presented and the legal arguments put forward, it is determined that the term "sales" includes the transfers in question within the meaning of the Business and Occupation Tax law and the receipt of such payments by the taxpayer clearly amounts to "gross income" in the form of reimbursements from the affiliated companies. Chapter 11, Article 13, Section 1 defines the terms "sale", "gross income" and "business" in the following manner:

"Sale," "sales" or "selling" includes any transfer of the ownership of or title to property, whether for money or in exchange for other property.

* * * * *

"Gross income" means the gross receipts of the taxpayer, . . . derived from trade, business, commerce or sales and the value proceeding or accruing from the sale of tangible property (real or personal), or service, or both, and all receipts by reason of the investment of the capital of the business engaged in, including rentals, royalties, fees, reimbursed costs or expenses or other emoluments however designated and including all interest, carrying charges, fees or other like income, however denominated, derived by the taxpayer from repetitive carrying of accounts, in the regular course and conduct of his business, and extension of credit in connection with the sale of any tangible personal property or service, and without any deductions on account of the cost of property sold, the cost of materials used, labor costs, taxes, royalties paid in cash or in kind or otherwise, interest or discount paid or any other expenses whatsoever . . .

* * * *

"Business" shall include all activities engaged in or caused to be engaged in with the object of gain or economic benefit, either direct or indirect.

The taxpayer makes purchases annually of approximately $30,000,000 in supplies and materials for its own use and the expected use of its affiliated companies. In contemplation of the resales to affiliates, the taxpayer is able to make large volume purchases with considerable saving to itself. This is clearly an economic benefit to the taxpayer even though it makes no subsequent profit from the resale, or transfer to the affiliated companies. The

taxpayer recoups from the cost of the merchandise as well as its handling charges from its affiliates. Thus, the taxpayer comes out even on its subsequently [sic] resale to the companies but is able to derive an economic benefit from the transactions through its volume purchasing ability. Therefore, it is determined such activity does come within the definition of "business" as found in Code §11-13-1.

The term "sales" includes transfers of ownership or title to property for a consideration. Columbia Transmission, in fact, has title and ownership to the property and transfers the same to its affiliated companies for a consideration. The companies are billed for the materials and supplies for which they subsequently remit payment to the taxpayer (transcript p. 344).

Finally, the definition of gross income after April 1, 1971 includes reimbursed costs or expenses derived from a taxpayer's business activities. The reimbursed costs received from the affiliated companies is thus part of Columbia Transmission's gross income. In light of the decisions rendered in the cases: *Bethlehem Mines* v. *Haden*, 153 W.Va. 721, 172 S.E.2d 126 (1969) and *Dailey* v. *Bechtel*, ... W.Va....., 207 S. E. 2d 169 (1974), it is determined that the reimbursed costs reecived by Columbia Transmission prior to April 1, 1971 are not subject to business and occupation tax. Therefore, gross income included in the assessment in the form of reimbursed costs prior to April 1, 1971, must be deleted.

Issue 3. Whether Taxpayer's Share of Expenses Incurred for Well-tending Services for Co-owned Wells is Subject to Business and Occupation Tax.

As previously noted, the taxpayer and other parties

co-owned certain wells in which the taxpayer incurred the operational expenses. These expenses were in turn billed to the respective owners by the taxpayer in relation to their percentage of ownership. The taxpayer reported the income received from the other owners under the service classification and remitted the tax due. The taxpayer's share of the expenses was shown on its internal records and was included in the present assessment.

Inasmuch as the taxpayer did not receive payment for the expenses it occurred [sic] in proportion to its share in the co-owned wells and the gross income figures in question merely represent a cost analysis, it is determined that this income should not have been included in the assessment. The assessment will be therefore modified to delete this income. The reimbursements received from the other co-owners have been properly reported.

Issue 4. Whether the Handling Charges For Drip Gasoline Should Include the Entire Receipts From the Sale of the Drip Gasoline.

The taxpayer and other parties own wells which produced natural gas in the Rocky Fork Field located in Kanawha County, West Virginia. As part of this production, drip gasoline was obtained which was subsequently sold to Ashland Oil. Two pipelines, both owned by the taxpayer, were utilized for transmission; one for natural gas and the other for drip gasoline. Ashland Oil was billed for the drip gasoline by the taxpayer and the proceeds were in turn distributed to the various owners. The taxpayer separately billed the owners for a handling charge to cover its expenses. The handling charges included the use of the taxpayer's pipeline and related services for which a certain rate per gallon was computed. The taxpayer reported its share of the drip gaso-

line sales under the production classification but failed to report the handling charges.

Upon audit, the total proceeds received from Ashland Oil for the drip gasoline were considered to be handling charges and were taxed under the service classification. The taxpayer conceded that the handling charges received from other owners were erroneously omitted but objected to the inclusion of the sales income as being the proper amount of the handling charges.

The record shows that the gross income taxed under the service classification as handling charges was the total drip gasoline sales income and was not the actual reimbursements made by the other owners. The taxpayer reported its share of the drip gasoline sales under the production classification and the remaining income received through their transactions from the other owners was clearly a service charge. Therefore, only those sums received from the other owners should have been taxed under the service classification to the taxpayer with the sales price being reported under the production classification in proportion by all of the owners. The assessment must be accordingly modified to reflect the proper gross income received for the services performed.

Issue 5. Whether the Business and Occupation Tax Assessment Should Be Dismissed for Any Year in Which the Corporation Net Income Tax Previously Remitted Exceeds the Total of the Business and Occupation Tax Paid and Assessed.

At the hearing held on October 5, 1977, the taxpayer made a motion to dismiss the assessment for all tax periods in which the Corporation Net Income Tax exceeded the statutory credit for Business and Occupation

Tax paid plus the assessment of Business and Occupation Tax for the period July 1, 1971 through December 31, 1974. The motion to dismiss was taken under advisement by the Hearing Examiner.

The taxpayer argues that even if the business and occupation tax assessment was ultimately upheld, no additional tax dollars would be due. Therefore, the taxpayer argues that the period of the assessment during July 1, 1971 through December 31, 1974 should be declared a moot question. Finally, citing *Swartz* v. *Public Serv. Comm.*, 136 W.Va. 782 (1952) taxpayer argues that administrators acting in a quasi-judicial opinion capacity are not constituted to decide moot questions.

While Code §11-24-9 provides for a credit against the Corporation Net Income Tax for Business and Occupation Tax, there is no provision which excuses the payment of business and occupation tax or provides for an offset before it is paid. Taxpayers may be required to file numerous returns for various taxes but the Tax Department does not have the statutory authority to excuse the filing of such returns or the payment of taxes even though a credit may be allowed. The Legislature has the authority to enact exemptions, not the Tax Department, and had the Legislature provided for an exemption under the business and occupation tax for taxpayers who are subject to corporation net income tax instead of a business and occupation tax credit, the present assessment would, in fact, be moot. Chapter 11 as enacted clearly requires the filing and remittance of tax under both Article 13 (business and occupation tax) and Article 24 (corporation net income tax) by taxpayers conducting business activities such as those conducted by Columbia Transmission.

While the *Swartz* opinion cited by the taxpayer supports the proposition that the West Virginia Supreme Court will not decide moot questions, the case is not on point as to the present controversy. The *Swartz* case involved an appeal to intervene in a Public Service Commission case which was found by the Court to be a moot question because while the appeal was pending in the Supreme Court, the Commission permitted the intervention.

The requirement to file returns and remit tax due under the business and occupation tax law is clearly not a moot question. The factual situation present in the *Swartz* case is distinguishable and the principle of law cited is not applicable. Therefore, it is determined that the taxpayer's motion to dismiss the business and occupation tax assessment for the period April 1, 1971 through December 31, 1974 is denied.

Issue 6. Whether the Penalties Should be Waived in Whole or in Part for Reasonable Cause.

Penalties are imposed under Code §11-13-11 upon the taxpayer's failure to make a return required by Article 13 or for the failure to remit in whole or in part the proper amount of tax due. Such penalties may be waived by the Tax Commissioner in whole or in part if such failure is due to reasonable cause.

Upon a thorough review of the record made in this case, it is determined that reasonable cause exists for waiver of the penalty pertaining to the tax assessed on the wholesale sales of natural gas. It is determined that the taxpayer relied upon the failure of the Tax Department to pursue the taxation these transactions and the taxpayer acted in good faith in failing to report those wholesale sales. It is further determined that the pen-

alty pertaining to the wholesale sales of materials and supplies to affiliated companies after April 1, 1971, must be affirmed in light of the amendment to Code §11-13-1 effective said date which added the term "reimbursed costs or expenses" to the definition of "gross income". As to the other items conceded by the taxpayer as not being reported through oversight, it is determined that penalty relating to the tax on these items must also be affirmed.

WHEREFORE, it is the DECISION of David C. Hardesty, Jr., Tax Commissioner of the State of West Virginia, that Columbia Gas Transmission Corporation is indebted to the State of West Virginia for business and occupation tax for the years 1970 through 1974 in the modified amount of $1,091,247.75 with penalties thereon in the modified amount of $448.17 for a total liability of $1,091,695.92.

/s/ DAVID C. HARDESTY, JR.
State Tax Commissioner

6-29-79
Date Rendered

16/1

UNITED STATES CONSTITUTION

Art. 1, § 8 (Commerce Clause)

The Congress shall have the Power . . . To regulate Commerce . . . among the several States . . . .

SECTION 1, W. VA. BUSINESS AND OCCUPATION TAX

(W. Va. Code §11-13-1)

§11-13-1. Definitions.

When used in this article, the term "person" or the term "company," herein used interchangeably, includes any individual, firm, copartnership, joint adventure, association, corporation, trust or any other group or combination acting as a unit, and the plural as well as the singular number, unless the intention to give a more limited meaning is disclosed by the context.

"Tax year" or "taxable year" means either the calendar year or the taxpayer's fiscal year when permission is obtained from the tax commissioner to use same as the tax period in lieu of the calendar year.

"Sale," "sales" or "selling" includes any transfer of the ownership of or title to property, whether for money or in exchange for other property.

"Taxpayer" means any person liable for any tax hereunder.

"Gross income" means the gross receipts of the taxpayer, other than a banking or financial business, received as compensation for personal services and the gross receipts of the taxpayer derived from trade, business, commerce or sales and the value proceeding or accruing from the sale of tangible property (real or personal), or service, or both, and all receipts by reason of the investment of the capital of the business engaged in, including rentals, royalties, fees, reimbursed costs or expenses or other emoluments however designated and including all interest, carrying charges, fees or other like income, however denominated, derived by the taxpayer

from repetitive carrying of accounts, in the regular course and conduct of his business, and extension of credit in connection with the sale of any tangible personal property or service, and without any deductions on account of the cost of property sold, the cost of materials used, labor costs, taxes, royalties paid in cash or in kind or otherwise, interest or discount paid or any other expenses whatsoever. "Gross income" of a banking or financial business is specified in section two-k [§11-13-2k] of this article.

"Gross proceeds of sales" means the value, whether in money or other property, actually proceeding from the sale of tangible property without any deduction on account of the cost of property sold or expenses of any kind.

The terms "gross income" and "gross proceeds of sales" shall not be construed to include (1) cash discounts allowed and taken on sales; (2) the proceeds of sale of goods, wares or merchandise returned by customers when the sale price is refunded either in cash or by credit; (3) the amount allowed as "trade-in value" for any article accepted as part payment for any article sold; (4) excise taxes imposed by this State; or (5) money or other property received or held by a professional person for the sole use and benefit of a client or another person or money received by the taxpayer on behalf of a bank or other financial institution for the repayment of a debt of another.

"Business" shall include all activities engaged in or caused to be engaged in with the object of gain or economic benefit, either direct or indirect. "Business" shall not include a casual sale by a person who is not engaged in the business of selling the type of property involved in

such casual sale. "Business" shall include the production of natural resources or manufactured products which are used or consumed by the producer or manufacturer and shall include the activities of a banking business or financial organization.

The term "banking business" or "financial organization" shall mean any bank, banking association, trust company, industrial loan company, small loan company or licensee, building and loan association, savings and loan association, finance company, investment company, investment broker or dealer, and any other similar business organization at least ninety per centum of the assets of which consists of intangible personal property and at least ninety per centum of the gross receipts of which consists of dividends, interest and other charges derived from the use of money or credit.

"Service business or calling" shall include all activities engaged in by a person for other persons for a consideration, which involve the rendering of a service as distinguished from the sale of tangible property, but shall not include the services rendered by an employee to his employer. This term shall include, but not be limited to:

(a) Persons engaged in manufacturing, compounding or preparing for sale, profit or commercial use, articles, substances or commodities which are owned by another or others;

(b) Persons engaged as independent contractors in producing natural resource products which are owned by another or others, as personal property, immediately after the same are severed, extracted, reduced to possession and produced;

(c) The repetitive carrying of accounts, in the regular course and conduct of business, and extension of credit

in connection with the sale of any tangible personal property or service, except as to persons taxed pursuant to the provisions of section two-k [§11-13-2k] of this article.

"Selling at wholesale" or "wholesale sales" shall mean and include: (1) Sales of any tangible personal property for the purpose of resale in the form of tangible personal property; (2) sales of machinery, supplies or materials which are to be directly consumed or used by the purchaser in the conduct of any business or activity which is subject to the tax imposed by this article or by article twelve-A [§11-12A-1 et seq.] of this chapter; and (3) sales of any tangible personal property to the United States of America, its agencies and instrumentalities or to the State of West Virginia, its institutions or political subdivisions.

"Contracting" shall include the furnishing of work, or both materials and work, in the fulfillment of a contract for the construction, alteration, repair, decoration or improvement of a new or existing building or structure, or any part thereof, or for the alteration, improvement or development of real property.

Note: This is the text of the statute during the last part of the 1970-74 assessment period. Earlier revisions were substantially to the same effect. Compare 1967 W. Va. Acts ch. 188, 1971 W. Va. Acts ch. 169, and 1972 W. Va. Acts ch. 119.

SECTION 2, W. VA. BUSINESS AND OCCUPATION TAX

(W. Va. Code §11-13-2)

§11-13-2. Imposition of privilege tax.

There is hereby levied and shall be collected annual privilege taxes against the persons, on account of the

business and other activities, and in the amounts to be determined by the application of rates against values or gross income as set forth in sections two-a to two-k [§§11-13-2a to 11-13-2k], inclusive, of this article.

If any person liable for any tax under section two-a or two-b [§11-13-2a or 11-13-2b] shall ship or transport his products or any part thereof out of the State without making sale of such products, the value of the products in the condition or form in which they exist immediately before transportation out of the State shall be the basis for the assessment of the tax imposed in said sections, except in those instances in which another measure of the tax is expressly provided. The tax commissioner shall prescribe equitable and uniform rules for ascertaining such value.

In determining value, however, as regards sales from one to another of affiliated companies or persons, or under other circumstances where the relation between the buyer and seller is such that the gross proceeds from the sale are not indicative of the true value of the subject matter of the sale, the tax commissioner shall prescribe uniform and equitable rules for determining the value upon which such privilege tax shall be levied, corresponding as nearly as possible to the gross proceeds from the sale of similar products of like quality or character where no common interest exists between the buyer and seller but the circumstances and conditions are otherwise similar.

Gross income included in the measure of the tax under sections two-a and two-b [§§11-13-2a and 11-13-2b] of this article shall neither be added nor deducted in computing the tax levied under the other sections of this article.

A person exercising any privilege taxable under sec-

tions two-a or two-b [§11-13-2a or 11-13-2b] of this article and engaging in the business of selling his natural resources or manufactured products at retail in this State shall be required to make returns of the gross proceeds of such retail sales and pay the tax imposed in section two-c [§11-13-2c] of this article for the privilege of engaging in the business of selling such natural resources or manufactured products at retail in this State. But any person exercising any privilege taxable under sections two-a or two-b [§11-13-2a or 11-13-2b] of this article and engaging in the business of selling his natural resources or manufactured products to producers of natural resources, manufacturers, wholesalers, jobbers, retailers or commercial consumers for use or consumption in the purchaser's business shall not be required to pay the tax imposed in section two-c [§11-13-2c] of this article.

Manufacturers exercising any privilege taxable under section two-b [§11-13-2b] of this article shall not be required to pay the tax imposed in section two-c [§11-13-2c] of this article for the privilege of selling their manufactured products for delivery outside of this State, but the gross income derived from the sale of such manufactured products outside of this State shall be included in determining the measure of the tax imposed on such manufacturer in section two-b [§11-13-2b].

A person exercising privileges taxable under the other sections of this article, producing coal, oil, natural gas, minerals, timber or other natural resource products the production of which is taxable under section two-a [§11-13-2a], and using or consuming the same in his business or transferring or delivering the same as any royalty payment, in kind, or the like, shall be deemed to be engaged in the business of mining and producing coal, oil,

natural gas, minerals, timber or other natural resource products for sale, profit or commercial use, and shall be required to make returns on account of the production of the business showing the gross proceeds or equivalent in accordance with uniform and equitable rules for determining the value upon which such privilege tax shall be levied, corresponding as nearly as possible to the gross proceeds from the sale of similar products of like quality or character by other taxpayers, which rules the tax commissioner shall prescribe.

Note: This is the text of the statute during the latter part of the 1970-74 assessment period. An earlier version was substantially to the same effect. Compare 1955 W. Va. Acts ch. 155 and 1971 W. Va. Acts ch. 169.

SECTION 2a, W. VA. BUSINESS AND OCCUPATION TAX

(W. Va. Code §11-13-2a)

§ 11-13-2a. Severance, extraction and production of coal and other natural resource products.

Upon every person exercising the privilege of engaging or continuing within this State in the business of severing, extracting, reducing to possession and producing for sale, profit or commercial use any natural resource products, the amount of such tax to be equal to the value of the articles produced as shown by the gross proceeds derived from the sale thereof by the producer, except as otherwise provided, multiplied by the respective rates as follows: Coal, three and five-tenths percent; limestone or sandstone, quarried or mined, two and two-tenths percent; oil, four and thirty-four one hundredths percent; natural gas, in excess of the value of five thousand dol-

lars, eight and sixty-three one hundreths percent; blast furnace slag, four and thirty-four one hundredths percent; sand, gravel or other mineral product not quarried or mined, four and thirty-four one hundredths percent; timber, two and two-tenths percent; other natural resource products, two and eighty six one hundredths percent. The measure of this is the value of the entire production in this State, regardless of the place of sale or the fact that the delivery may be made to points outside the State: Provided, however, that for the purposes of the production of oil classification, and the production of natural gas classification, as set forth in this section, multiple co-owners of oil or natural gas, in place, lessees thereof, or others being vested with title and ownership to part or all of the oil and gas, as personal property, immediately after severance, extraction, reduction to possession and production, except royalty recipients in kind, shall be deemed to be a "group or combination acting as a unit" and one "person," as defined in section one [§11-13-1] of this article, if not otherwise defined therein, whenever engaged in the business of producing oil or natural gas through common use, by joint or separately executed contracts, of the same independent contractor driller or operator's services; and notwithstanding provisions of private contracts for separate deposit of gross receipts in separate members' accounts or for members of such group or combination to take in kind any proportionate part of such natural resources.

Lessees, sublessees or other denominated lessees are considered to be producers of all of the oil or natural gas produced, regardless of any payment, in kind, to lessors, sublessors or other denominated lessors of a part of such natural resources as rents or royalties. Recipients of royalties or rents, in kind, in cash or otherwise are taxable on

their gross income pursuant to the provisions of section two-i [§11-13-2i] of this article.

Note: This is the text of that statute during the latter part of the 1970-74 assessment period. An earlier version was substantially to the same effect, except for changes in the severance tax rates. Compare 1959 W. Va. Acts ch. 167 with 1971 W. Va. Acts ch. 169.

SECTION 2b, W. VA. BUSINESS AND OCCUPATION TAX

(W. Va. Code §11-13-2b)

§11-13-2b. Manufacturing, preparing or compounding products; processing of food excepted.

Upon every person engaging or continuing within this State in the business of manufacturing, compounding or preparing for sale, profit, or commercial use, either directly or through the activity of others in whole or part, any article or articles, substance or substances, commodity or commodities, or electric power produced by public utilities or others and not taxed under other provisions of this article, or newspaper publishing (including all gross income or proceeds of sale from circulation and advertising), the amount of the tax to be equal to the value of the article, substance, commodity or electric power or newspaper, manufactured, compounded or prepared for sale, as shown by the gross proceeds derived from the sale thereof by the manufacturer or person compounding or preparing the same, except as otherwise provided, multiplied by a rate of eighty-eight one hundreths of one percent. The measure of this tax is the value of the entire product manufactured, compounded or prepared in this State for sale, profit or commercial use, regardless of the place of sale or the fact that deliveries may be made to points outside the State. However, the dressing and pro-

cessing of food by a person, firm or corporation, which food is to be sold on a wholesale basis by such person, firm or corporation shall not be considered as manufacturing or compounding, but the sale of these products on a wholesale basis shall be subject to the same tax as is imposed on the business of selling at wholesale as provided in section two-c [§11-13-2c].

It is further provided, however, that in those instances in which the same person partially manufactures, compounds or prepares products within this State and partially manufactures, compounds or prepares such products outside of this State the measure of his tax under this section shall be that proportion of the sale price of the product that the payroll cost of manufacturing within this State bears to the entire payroll cost of manufacturing the product; or, at the option of the taxpayer, the measure of his tax under this section shall be the proportion of the sales value of the articles that the cost of operations in West Virginia bears to the full cost of manufacture of the articles.

Note: This is the text of the statute during the last part of the 1970-74 assessment period. Earlier versions were substantially to the same effect, except for a 1971 change in the manufacturing tax rate. Compare 1967 W. Va. Acts ch. 188, 1971 W. Va. Acts ch. 169, and 1974 W. Va. Acts ch. 133.

SECTION 2c, W. VA. BUSINESS AND OCCUPATION TAX

(W. Va. Code §11-13-2c)

§11-13-2c. Business of selling tangible property; sales exempt.

Upon every person engaging or continuing within this State in the business of selling any tangible property

whatsoever, real or personal, including the sale of food, and the services incident to the sale of food in hotels, restaurants, cafeterias, confectioneries, and other public eating houses except sales by any person engaging or continuing in the business of horticulture, agriculture or grazing, or of selling stocks, bonds or other evidences of indebtedness, there is likewise hereby levied, and shall be collected a tax equivalent to fifty-five one hundredths of one percent of the gross income of the business, except that in the business of selling at wholesale the tax shall be equal to twenty-seven one hundredths of one percent of the gross income of the business.

Note: This is the text of the statute during the latter part of the 1970-74 assessment period. An earlier version was substantially to the same effect, except for a change in the tax rates on both wholesale and retail selling activities. Compare 1959 W. Va. Acts ch. 167 and 1971 W. Va. Acts ch. 169.

SECTION 2d, W. VA. BUSINESS AND OCCUPATION TAX

(W. Va. Code §11-13-2d, as codified by 1959 W. Va. Acts c. 167, § 2d)

§11-13-2d [effective during the assessment period from January 1, 1970 to April 1, 1971]. Public service or utility business.

Upon any person engaging or continuing within this state in any public service or utility business, except railroad, railroad car, express, pipe line, telephone and telegraph companies, water carriers by steamboat or steamship and motor carriers, there is likewise hereby levied and shall be collected taxes on account of the business engaged in equal to the gross income of the business multiplied by the respective rates as follows: Street and

interurban and electric railways, one and three-tenths percent; water companies, four per cent except as to income received by municipally-owned water plants; electric light and power companies, five and two-tenths per cent on sales and demand charges for domestic purposes and commercial lighting and three and nine-tenths per cent on sales and demand charges for all other purposes, except as to income received by municipally-owned plants producing or purchasing electricity and distributing same; natural gas companies, three and nine-tenths per cent on the gross income, said gross income for this purpose to be determined by deducting from gross income from all sales of gas to consumers the amount of the tax paid by the taxpayer under section two-a of this article on the production of the same gas; toll bridge companies, three and nine-tenths per cent; and upon all other public service or utility business, two and six-tenths per cent. The measure of this tax shall not include gross income derived from commerce between this state and other states of the United States or between this state and foreign countries. The measure of the tax under this section shall include only gross income received from the supplying of public services. The gross income of the taxpayer from any other activity shall be included in the measure of the tax imposed upon the appropriate section or sections of this article.

Note: This statute, effective only during the first 15 months of the assessment period, is involved in one of the unlawful types of discrimination against interstate commerce addressed in the Jurisdictional Statement at _____.

The same statute as effective on and after April 1, 1971, is reprinted below for comparative purposes, although its provisions are not strictly applicable to the appeal.

SECTION 2d, W. VA. BUSINESS AND OCCUPATION TAX

(W. Va. Code §11-13-2d, as codified by 1971 W. Va. Acts c. 169, § 2d)

§11-13-2d [effective during the assessment period on and after April 1, 1971]. Public service or utility business.

Upon any person engaging or continuing within this State in any public service or utility business, except railroad, railroad car, express, pipeline, telephone and telegraph companies, water carriers by steamboat or steamship and motor carriers, there is likewise hereby levied and shall be collected taxes on account of the business engaged in equal to the gross income of the business multiplied by the respective rates as follows: Street and interurban and electric railways, one and four-tenths percent; water companies, four and four-tenths percent except as to income received by municipally owned water plants; electric light and power companies, five and seventy-two hundreths percent on sales and demand charges for domestic purposes and commercial lighting and four and twenty-nine hundreths percent on sales and demand charges for all other purposes, except as to income received by municipally owned plants producing or purchasing electricity and distributing same; natural gas companies, four and twenty-nine hundreths percent on the gross income; toll bridge companies, four and twenty-nine hundreths percent; and upon all other public service or utility business, two and eighty-six hundreths percent. The measure of this tax shall not include gross income derived from commerce between this State and other states of the United States or between this State and foreign countries. The measure of the tax under this section shall include only gross income received from the

supplying of public services. The gross income of the taxpayer from any other activity shall be included in the measure of the tax imposed upon the appropriate section or sections of this article.

NOTICE OF APPEAL

In The

SUPREME COURT OF APPEALS OF
WEST VIRGINIA

No. _____

COLUMBIA GAS TRANSMISSION CORPORATION,
Petitioner,

v.

HERSCHEL H. ROSE III, Tax Commissioner,
Respondent.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Columbia Gas Transmission Corporation and Columbia Gas of West Virginia, Inc., hereby appeal to the Supreme Court of the United States from the final order of the Supreme Court of Appeals of West Virginia, entered in this proceeding *sub nom. Columbia Gas Transmission Corporation v. Hardesty* on March 11, 1982, refusing to hear an appeal from a judgment in the Circuit Court of Kanawha County, West Virginia, entered on April 24, 1981, affirming the deter-

mination and reassessment of the Tax Commissioner of West Virginia of Business and Occupation Tax and penalties claimed to be due and owing the State by Columbia Gas Transmission Corporation and Columbia Gas of West Virginia, Inc.

A copy of this notice will also be filed in the Circuit Court of Kanawha County, West Virginia, inasmuch as the record has been returned from this Court to the Circuit Court.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

/s/ H. L. SNYDER

H. L. Snyder
F. Samuel Byrer
1700 MacCorkle Avenue, S.E.
(P. O. Box 1273)
Charleston, WV 25325-1273
(304) 346-0951

Attorneys for Columbia Gas Transmission Corporation

CERTIFICATE OF SERVICE

This is to certify that service of the foregoing Notice of Appeal to the Supreme Court of the United States was made on the only party required to be served by mailing a true copy thereof to Appellee's attorney, Robert P. Howell, Assistant Attorney General, addressed to him at the Attorney General's Office, State Capitol, Charleston,

Motion to Dismiss

Office - Supreme Court, U.S.
FILED
SEP 30 1982
ALEXANDER L. STEVAS,
CLERK

NO. 81-2225

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1981

COLUMBIA GAS TRANSMISSION CORPORATION
Appellant,

v.

HERSCHEL H. ROSE III,
Tax Commissioner Of West Virginia,
Appellee.

ON APPEAL FROM THE
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MOTION TO DISMISS OR AFFIRM

Of Counsel

CHAUNCEY H. BROWNING
Attorney General

JACK C. McCLUNG
Deputy Attorney General

E. WAYNE BASCONI
Assistant Attorney General

State Capitol
Charleston, West Virginia
25305

ROBERT P. HOWELL
Assistant Attorney General
for the State of West Virginia
State Capitol, W-435
Charleston, West Virginia 25305
(304) 348-2522

Counsel for Appellee
Herschel H. Rose III

QUESTIONS PRESENTED

Appellee disagrees with appellant's presentation of the Questions Presented in this appeal and herewith presents a more accurate statement of the questions presented the Court:

1. Whether the imposition of the West Virginia business and occupation tax upon appellant's business activity of making wholesale sales of natural gas in West Virginia is fairly apportioned and thus constitutional.

2. Whether the imposition of the West Virginia business and occupation tax upon appellant's business activity of making wholesale sales of natural gas in West Virginia discriminates against interstate commerce.

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NO. 81-2225

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

COLUMBIA GAS TRANSMISSION CORPORATION,

Appellant,

v.

HERSCHEL H. ROSE III,
TAX COMMISSIONER OF WEST VIRGINIA,

Appellee,

ON APPEAL FROM THE SUPREME COURT OF
APPEALS OF WEST VIRGINIA

MOTION TO DISMISS OR AFFIRM

This appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Circuit Court of Kanawha County, West Virginia,

on the grounds that this appeal does not present a substantial federal question, that the judgment below rests on an adequate nonfederal basis, and on other grounds which this appellee will present herein which establish that the Court should not set this case for argument.

OPINION BELOW

The March 2, 1981 letter, opinion of the Circuit Court of Kanawha County, West Virginia, and the Circuit Court's judgment order of April 24, 1981, are printed in the Appendix, appended to appellant's jurisdictional statement.

JURISDICTION

The proceeding below began with an assessment of tax under the West Virginia business and occupation tax, Chapter 11, Article 13, of the West Virginia Code of 1931, as amended. The assessment was upheld as modified by the Tax Commissioner of West Virginia upon evidence taken at administrative hearings. Upon timely appeal to the Circuit Court of Kanawha County, the Tax Commissioner's decision was affirmed and judgment rendered against the appellant.

Appellant sought an appeal from the Circuit Court's decision in the West Virginia Supreme Court of Appeals and was thrice refused. The appellant then filed a notice of appeal to this Court with the West Virginia Supreme Court of Appeals and the Circuit Court of Kanawha County, West Virginia, on June 3, 1982. The asserted jurisdiction of the Supreme Court to hear this appeal rests upon 28 U.S.C. § 1257 (2).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article 1, § 8, of the United States Constitution, the Commerce Clause, and the pertinent West Virginia statutes are set forth in the Appendix, appended to appellant's Jurisdictional Statement.

STATEMENT OF THE CASE

The facts of this case are set forth in the Tax Commissioner's administrative decision (Appendix, appended to Appellant's Jurisdictional Statement, A. at 33a). Facts pertinent to this appeal are as follows:

Appellant made wholesale sales of natural gas to both affiliated and nonaffiliated companies. The assessment of business and occupation tax is upon wholesale sales of natural gas made by the appellant to its customers in the State of West Virginia. The actual production of the natural gas, whether by appellant or another, the acquisition of the gas by appellant, when produced by another, the resale of the gas by appellant's customer and the actual comsumption of the gas could and did take place either within or without the State of West Virginia. (A. at 37a.)

It is undisputed that the wholesale sales took place in West Virginia between separate legal entities. (A. at 42a.) The activities taxed all occurred in West Virginia. (A. at 44a.) Appellant failed to demonstrate that the gross receipts derived from the wholesale sales of natural gas in West Virginia were subject to tax by any state other than West Virginia. (A. at 50a.)

During the years covered by the audit, appellant failed to report its gross income derived from its wholesale sales of natural gas in West Virginia. Ap-

pellant characterizes such sales as being in interstate commerce. The Tax Commissioner of West Virginia determined, pursuant to such audit, that the gross income from the sales of natural gas by appellant in West Virginia was properly subject to the business and occupation tax.

The assessment of tax was made against appellant in 1977 for business and occupation tax for the years 1970 through 1974, and the assessment was upheld, as modified, by the Tax Commissioner of West Virginia, in his administrative decision dated June 29, 1979. Appellant appealed the Tax Commissioner's administrative decision to the Circuit Court of Kanawha County, West Virginia, where the decision was affirmed.

The Circuit Court of Kanawha County held that the tax could be imposed upon appellant's gross income from the sale of natural gas in West Virginia and that the taxing statute did not require a value-added tax as proposed by the taxpayer. The Court further held that a distinction is to be made between the subject and the measure of the tax. The Court found the subject of the business and occupation tax to be the privilege of conducting a particular business activity.

Appellant sought an appeal from such decision in the West Virginia Supreme Court of Appeals which was refused on three occasions.

ARGUMENT

I.

THE IMPOSITION OF THE WEST VIRGINIA BUSINESS AND OCCUPATION TAX UPON APPELLANT'S BUSINESS ACTIVITY OF MAKING WHOLESALE SALES OF NATURAL GAS IN WEST VIRGINIA IS FAIRLY APPORTIONED AND THUS CONSTITUTIONAL.

The West Virginia business and occupation tax is a fairly apportioned tax because the local activities of the taxpayer provide not only the tax nexus, but also form the boundary of the tax incident.

Appellant argues that the application of the business and occupation tax upon its gross income is " unreasonably malapportioned." Such position ignores the tax structure of West Virginia which imposes a business and occupation tax, a gross receipts tax, upon certain business activities, i.e., making of wholesale sales, the measure of the tax being the gross proceeds derived from the sale.

The privilege which West Virginia seeks to tax is that of "engaging or continuing within this State * * * in the business of selling at wholesale."

Chapter 11, Article 13, Section 2c, of the West Virginia Code of 1931, as amended. (A. at 74a and 75a.) The tax is imposed by Chapter 11, Article 13, Section 2, of the West Virginia Code of 1931, as amended, upon the "gross income" derived from such activity. (A. at 69a.) "Gross income" is defined as being "the gross receipts of the taxpayer." Chapter 11, Article 13, Section 1, of the West Virginia Code of 1931, as amended. (A. at 65a.)

West Virginia is not seeking to tax production or transportation activities occurring in states other than West Virginia. Other states do not tax the wholesale sales activity of appellant carried on wholly within West Virginia. Gross receipts from sales made in other states are not included in the measure of the tax. The value of the natural gas sold by appellant in West Virginia, the gross proceeds received by appellant from the sale thereof, is merely the measure of the tax which is imposed on exclusively in-State wholesale sales activities.

The lower court recognized the holding of this Court in **Complete Auto Transit, Inc. v. Brady**, 430 U.S. 274, (1977) as requiring an inquiry into the practical "economic consequences" of a tax to determine its constitutionality. However, the lower court refused to transform the gross receipts tax into a value-added tax. As stated in its letter opinion:

> "Despite **Complete Auto Transit's** general emphasis on economic consequences as opposed to statutory labels, the case does not require a value-added tax like that proposed by the taxpayer in lieu of an activity/gross receipts tax like the West Virginia business and occupation tax. **Complete Auto Transit** does not

> obliterate the distinction between the subject of a tax and its measure (base). Stated another way, the **nature** of the tax actually formulated by the state is still important and may not be ignored in favor of economic theory, especially, where, as here, that theory (the value-added tax) has been expressly rejected by the state's fiscal policy-formulators. The subject of the business and occupation tax is the privilege of conducting a particular classification of business within this state, here, the business of wholesale sales. The base portion of the measure of the tax for this classification is 'gross income' defined in section 1 of the statute to include 'gross receipts of the taxpayer derived from * * * sales * * *.' "

This Court has held that the measure of a privilege tax may be the selling price of the product involved. As stated in **Western Live Stock v. Bureau of Revenue**, 303 U.S. 250 (1937):

> "Selling price, taken as a measure of value whose accuracy appellants do not challenge, is for all practical purposes a convenient means of arriving at an equitable measure of the burden which may be imposed on an admittedly taxable subject matter. * * *" 303 U.S. at 258.

The fact that the value which the gross receipts measure is, in large part, the result of activity outside the territorial limits of the taxing jurisdiction does not

mean the gross receipts are not fairly related to the activity within the jurisdiction. There is no constitutional objection to resorting to extraterritorial elements in determining the measure of a tax. **General Motors Corp. v. Washington**, 377 U.S. 436 (1964); **Wisconsin v. J. C. Penney Co.**, 311 U.S. 435 (1940); **Great Atlantic & Pacific Tea Co. v. Grosjean**, 301 U.S. 411 (1937).

In **General Motors**, this Court sustained a state tax imposed upon the privilege of engaging in business activities within the state, measured by General Motors' gross receipts from wholesale sales of motor vehicles, parts and accessories delivered in Washington. The fact that the gross receipts in large part represented extensive out-of-state manufacturing and operational activities did not mean that the gross receipts were not fairly related to the act of selling.

As stated by this Court in **Wisconsin v. J. C. Penney Co., supra**, 311 U.S. at 445:

> "The fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction."

General Motors, supra, was followed by **Standard Pressed Steel v. Washington Department of Revenue**, 419 U.S. 560 (1975). There the state of Washington sought to tax the gross income from sales made by Standard Pressed Steel's one employee in Washington who, operating out of his home, made periodic contacts with the Boeing Company in Washington. The Washington courts affirmed the tax and this Court, placing substantial reliance on **General Motors**,

unanimously agreed. As to the apportionment issue and the fact that the gross income was subjected to Washington's business and occupation tax, this Court concluded that the tax is ' "apportioned exactly to the activities taxed," ' all of which are intrastate.

In the **Department of Revenue of Washington v. Association of Washington Stevedoring Companies,** 435 U.S. 734 (1978), this Court held:

> "When a general business tax levies only on the value of services performed within the State, the tax is properly apportioned and multiple burdens logically cannot occur. * * *" 435 U.S. at 746.

In accordance with appellant's reliance upon **Maryland v. Louisiana,** 451 U.S. 725, 755, n.27 (1981), that "a tax on interstate commerce must be reasonably apportioned to the value of the activities occurring within the State" is the fact that in this appeal the subject of the tax, that of making wholesale sales, is measured by the gross income derived therefrom. Accordingly, the tax being imposed upon a wholly in-State activity is properly apportioned under the rationale of **Department of Revenue of Washington, supra,** and **Maryland v. Louisiana, supra,** for the reason that the tax is imposed upon an activity "performed" or "occurring" within West Virginia.

This Court tacitly recognized the measure of a gross receipts tax, **i.e.,** gross income, as being fairly apportioned in **Moorman Manufacturing Company v. Bair,** 98 S. Ct. 2340 (1978), in upholding a single-factor destination sales formula for the apportionment of net income of an interstate business engaged in the manufacture and sale of feed and livestock. Con-

trasting such single-factor sales formula for taxation with the gross receipts tax involved in **Standard Pressed Steel, supra,** and **General Motors Corp., supra,** the Court stated:

> "Finally, it would be an exercise in formalism to declare appellant's income tax assessment unconstitutional based on speculative concerns with multiple taxation. For it is evident that appellant would have had no basis for complaint if, instead of an income tax, Iowa had imposed a more burdensome gross receipts tax on the gross-receipts from sales to Iowa customers. In Standard Pressed Steel Co. v. Washington Revenue Dept. 419 U S 560, 95 S Ct 706, 42 L Ed 2d 719, the Court sustained a tax on the entire gross receipts from sales made by the taxpayer into Washington State. Because receipts from sales made to States other than Washington were not included in Standard Pressed Steel's taxable gross receipts, the Court concluded that the tax was ' "apportioned exactly to the activities taxed." ' Id., at 564, 42 L Ed 2d 719, 95 S Ct at 706.
>
> "In this case appellant's actual income tax obligation was the rough equivalent of a 1% tax on the entire gross receipts from its Iowa sales. Thus, the actual burden on interstate commerce would have been the same had Iowa imposed a plainly valid gross receipts tax instead of the challenged income tax. Of more significance, the gross receipts tax

sustained in Standard Pressed Steel and General Motors Corp. v. Washington, 377 U S 436, 12 L Ed 2d 430, 84 S Ct 1564, is inherently more burdensome than the Iowa income tax. It applies whether or not the interstate concern is profitable and its imposition may make the difference between profit and loss. In contrast, the income tax is only imposed on enterprises showing a profit and the tax obligation is not heavy unless the profits are high." 437 U.S. 280.

Respecting the testimony of the economists alluded to by appellant in its Jurisdictional Statement, it is of significance to note that Ms. Musgrave while finding fault with a gross receipts tax nevertheless testified that there was no single correct way of allocating tax base under such system of taxation. Specifically referring to the West Virginia business and occupation tax, Musgrave testified that it was not common to apportion such type of tax, but rather that sales (gross receipts) are commonly assigned to the jurisdiction in which the sale takes place.

Musgrave did conclude that the method of taxation and the measure of the tax is for the policymakers, the legislative and executive branches of government. As observed by the lower court, "that theory [the value-added tax] has been expressly rejected by the state's fiscal policy-formulators."

Thus, appellant's theory of the tax in question being unreasonably malapportioned and thus unconstitutional is without merit. The West Virginia business and occupation tax has its roots in the local transaction, and by its very nature carries its own proportionality.

II.

THE IMPOSITION OF THE WEST VIRGINIA BUSINESS AND OCCUPATION TAX UPON APPELLANT'S BUSINESS ACTIVITY OF MAKING WHOLESALE SALES OF NATURAL GAS IN WEST VIRGINIA DOES NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE.

In its Jurisdictional Statement, appellant asserts that the tax in question discriminates against interstate commerce in three different ways. The first alleged basis of discrimination is the interplay between Sections 2, 2a, and 2c, of Chapter 11, Article 13, of the West Virginia Code of 1931, as amended. (A. at 68a through 75a.) Specifically, the fifth paragraph of Code 11-13-2 provides that a person subject to the natural resource production privilege tax provided by Code 11-13-2a is not also subject to the wholesale sales business tax provided by Code 11-13-2c. Appellant contends that since an out-of-State producer has to pay the wholesale sales tax under Code 11-13-2c, while the in-State producer does not, this is discrimination against interstate commerce that violates the Commerce Clause. Appellee submits that the tax in question is not discriminatory in this manner or in any other manner.

First, the standard announced by this Court in determining if a state tax violates the Commerce Clause for being discriminatory is: "No state may, consistent with the Commerce Clause, 'impose a tax which discriminates against interstate commerce * * * by providing a direct commercial advantage to local

business.' " **Boston Stock Exchange v. State Tax Commission,** 429 U. S. 318, 329 (1977). Further, when determining whether a state tax is discriminatory, the tax must be assessed in light of its actual effect and considered in conjunction with other provisions of a state's taxation scheme. **Maryland v. Louisiana,** 451 U.S. 725 (1981). The lower court correctly recognized this principle by quoting **Halliburton Oil Well Cementing Co. v. Reily,** 373 U.S. 64, (1963): "proper analysis must take 'the whole scheme of taxation into account,' " and "equality for the purposes of competition and the flow of commerce is measured in dollars and cents, not legal abstractions." (A. at 30a.)

In conformity with cases decided by this Court, a state's taxation scheme passes constitutional muster if interstate and intrastate businesses are subject to essentially the same tax burden. That is, a state tax is constitutional as long as interstate business and intrastate businesses are subject to essentially the same tax burden on the same local activities under the state's comprehensive scheme of taxation. It is not necessary that they both pay under any one particular tax or classification.

Accordingly, the fact that a producer of natural gas subject to the West Virginia business and occupation tax on production of natural resources (Code 11-13-2a)[1] is not subject to the tax on wholesale

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[1]Appellant, in its Jurisdictional Statement, refers to Code 11-13-2a as a severance tax. In fact, it is really not a true severance tax, but rather a much broader tax on the privilege " 'of severing, extracting, reducing to possession and producing for sale, profit, or commercial use any natural resource products.' " (A. at 71a.)

sales does not amount to discrimination against interstate commerce. A West Virginia producer of natural gas is exempt from the wholesale sales tax, imposed at the rate of .27 percent, only if he has paid the tax on production at the rather substantial rate of 8.63 percent. Given these different tax rates, it cannot be said that an in-State producer who sells its gas in West Virginia is going untaxed while an out-of-State producer is carrying an unfair share of the tax burden. The Legislature saw fit to tax the production of natural resources at a higher rate than other business activities, and then allow the producer to sell the resource at the wholesale level tax-free. If the in-State producer sells West Virginia produced natural gas at the retail level, or any other person sells West Virginia produced gas at wholesale, such sales are subject to taxation. Thus, the only time that a wholesale sale of West Virginia produced gas goes tax-free is when it is sold by a producer who has paid tax on the production privilege at a much higher rate. This is an entirely reasonable system of taxation of the production and sale of natural gas in West Virginia that does not discriminate against interstate commerce.

This Court has upheld similar systems of state taxation. In **Caskey Baking Co. v. Virginia,** 13 U.S. 117 (1941), the tax complained of there was an annual license tax of $100 imposed for each vehicle used in the business of peddling goods or merchandise. The license tax did not apply to local manufacturers that paid a tax on their capital or local distributors having a fixed place of business in the state who paid a state tax on their purchases. Thus, the practical effect of the statute was that the vehicles of local manufacturers and distributors were exempt from the license tax, while the vehicles of vendors domiciled out-of-state

were subject to the tax. The appellant in the case was a West Virginia bakery that sent its trucks into Virginia to sell bakery goods.

This Court held the license tax to be constitutional, upon a finding that the tax in question was but one portion of a reasonable comprehensive scheme of taxation. Also, the Court held that while local manufacturers and distributors were not subject to the tax on their vehicles, they paid other state taxes which the state deemed sufficient to cover all of their activities, including the vending of goods. The Court in its decision also noted if the license tax was not allowed, the out-of-state vendors would be the only vendors in Virginia to escape some form of taxation.

Likewise, in the case of **Alaska v. Arctic Maid, 366 U.S. 199 (1961)**, the tax involved was a four percent occupation tax on freezer ships processing fish taken from Alaskan waters. The taxpayer there used freezer ships for the taking and preservation of salmon along Alaska's shores. After freezing the fish, the freezer ship would return to the state of Washington where the fish were canned. The taxpayer claimed discrimination, since fish that were caught and canned in Alaska were not subject to the four percent tax. This Court looked at Alaska's entire scheme of taxation and upheld the tax, saying:

> "It is claimed that there was no tax on salmon caught and frozen in Alaska and destined for canning in Alaska and that therefore this law is discriminatory against freezer ships. Alaskan canneries, however, paid a six-percent tax on the value of salmon obtained for canning; and local fish processors, which sell to the fresh-frozen

consumer market, paid a one-percent tax. The freezer ships do not compete with those who freeze fish for the retail market. The freezer ships take their catches south for canning. Their competitors are the Alaskan canners; and we know from the record that fish canned locally usually are not frozen. When we look at the tax laid on local canners and those laid on 'freezer ships,' there is no discrimination in favor of the former and against the latter. For no matter how the tax on 'freezer ships' is computed, it did not exceed the six-percent tax on the local canners. * * * If there is a difference between the taxes imposed on these freezer ships and the taxes imposed on their competitors, they are not so 'palpably disproportionate' (International Harvester Co. v. Evatt, 329 US 416, 422, 91 L ed 390, 395, 67 S Ct 435) as to run afoul of the Commerce Clause. No 'iron rule of equality' between taxes laid by a State on different types of business is necessary." (Citations omitted.) **Alaska v. Arctic Maid, supra,** at 204.

See also, Gregg Dyeing Co. v. Query, 286 U.S. 472 (1932).

Accordingly, although in-State producers of natural gas do not pay under the wholesale sales classification of the business and occupation tax, they nevertheless must pay a tax, at a much higher rate, on the entire production privilege which includes everything from severance of the natural resource to producing it for sale or commercial use. Given the tax

burden placed on the in-State producer of natural gas, it cannot be said that appellant pays a disproportionate amount of tax on its in-State sales.

Appellant's contention regarding the second type of discrimination is likewise without merit. The basis of such claim is that for the first fifteen months of the assessment period (January 1, 1970 through March 31, 1971), the then effective provisions of West Virginia Code 11-13-2d allowed a deduction from a public utility's gross receipts equal to the amount of tax paid under Code 11-13-2a. on the production of natural gas. (A. at 77a.) Appellant contends that for the first nine months of 1970, its predecessor, United Fuel Gas Company, was a public utility and was not entitled to the same deduction since it was an out-of-State producer of natural gas.

First, the issue of possible discrimination under former Code 11-13-2d, as it applied to retail sales of natural gas by public utilities need not be decided by this Court. The assessment and the decision below dealt only with the taxation of appellant's wholesale sales in West Virginia and not its or its predecessor's sales as a public utility. (A. at 41a.) Thus, this Court need not determine the constitutionality of the tax imposed by Code 11-13-2d, since this tax was not part of the assessment against the appellant.

Even if the issue was before the Court, appellant could show no dollar and cents discrimination against interstate commerce under West Virginia's total scheme of taxation. Simply because West Virginia allowed public utilities to deduct the tax paid at the higher production rate from their gross receipts does not amount to palpable discrimination.

This is true even though a public utility may have paid similar production taxes outside of the state. A state is not required to give a credit against its own taxes for taxes paid to another state. "A state, for many purposes, is to be reckoned as a self-contained unit, which may frame its own system of burdens and exemptions without heeding systems elsewhere." **Henneford v. Silas Mason Co.**, 300 U.S. 577, at 587 (1937).

Finally, appellant asserts that a third manner of discrimination results from the treatment given manufacturers under Chapter 11, Article 13, Section 2b, of the West Virginia Code of 1931, as amended. (A. at 73a.) Appellant contends that because a person that manufactures a product partially in-state and partially out-of-state is allowed to apportion his gross receipts between the two states; so should a wholesaler engaged in interstate commerce.

The reasons for the differences in the statute are obvious. Under Code 11-13-2b, the activity being taxed is manufacturing. If part of that activity occurs out-of-State, obviously West Virginia can tax only that part of manufacturing occurring in the State. That is what the apportionment formula does.

On the other hand, Code 11-13-2c taxes the activity of selling at wholesale in the State. It is the activity of selling a product, not the producing or manufacturing of that product that is the subject of the tax. In appellant's case, while the product may have been produced elsewhere, the selling activity takes place wholly in West Virginia. The tax, as shown in the argument above, is apportioned exactly to the activity taxed, all of which occurs in West Virginia.

The manufacture of a product and the selling of a product are two different types of activities. The West Virginia Business and Occupation tax recognizes the differences between the two activities and classifies them accordingly. The proper classification of different activities under a tax statute is not discrimination. **Caskey Baking Co. v. Virginia, supra,** at 121.

CONCLUSION

Counsel for the appellee, Herschel H. Rose III, Tax Commissioner of the State of West Virginia, respectfully submits that the lower court decision is clearly correct; that this appeal does not present a substantial federal question; that the judgment below rests on an adequate nonfederal basis; and, that this Court should dismiss this appeal and affirm the decision below.

Respectfully submitted,

ROBERT P. HOWELL
Assistant Attorney General for the State of West Virginia
State Capitol, Room W-435
Charleston, West Virginia 25305

(304) 348-2522

Counsel for Appellee,
Herschel H. Rose III

Of Counsel

CHAUNCEY H. BROWNING
Attorney General

JACK C. McCLUNG
Deputy Attorney General

E. WAYNE BASCONI
Assistant Attorney General

State Capitol
Charleston, West Virginia 25305